

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA,))
Plaintiff ,))
vs.) CASE NUMBER: ELH 21-cr-036
JACKY LYNN McCOMBER,))
Defendant.))
_____)

TRANSCRIPT OF PROCEEDINGS - DISCOVERY CONFERENCE
BEFORE THE HONORABLE ELLEN L. HOLLANDER, SENIOR JUDGE
Tuesday, January 30, 2024
Baltimore, Maryland

A P P E A R A N C E S

FOR THE PLAINTIFF:

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BY: ALLI G. KATZEN, ESQUIRE (Present via telephone)
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Also Present:

Agent Nathaniel Brown, DCIS
Jim Pyne, Esquire, NSA OGC
Holly Peacy, Investigative Agent, NSA OIG

Proceedings Recorded by Mechanical Stenography
Transcript Produced by Computer-Aided Transcription

P R O C E E D I N G S

(10:04 a.m.)

THE COURT: We are here this morning in the matter of United States of America v. Jacky Lynn McComber. That is Criminal Case Number 21-036, obviously ELH. The matter has been set in this morning for discussion of a proposed order relating to further discovery demands by the defense on the National Security Agency in this case.

THE COURT: Request, you could characterize it that way.

MR. GRAY: I don't really interpret them as requests, but if Your Honor wants to put it in those terms I think that would be the way to view it, actually.

My name is Jefferson M. Gray, Assistant United States Attorney here on behalf of the United States. With me at Government counsel table is DCIS Investigating Agent Nathaniel Brown.

Also with us in the courtroom this morning are left to right, Andrew Snowden who is senior counsel to the Inspector General of the National Security Agency; Holly Peacy who Your Honor has previously encountered on the telephone who is an investigative agent with the National Security Agency Office of the Inspector General; Julie Davis who is also an agent with the National Security Agency Office of Inspector General who has been working on dealing with these requests more

1 recently and then finally, Jim Keefe who is the chief of the
2 information security and classification section of the
3 National Security Agency. And then finally, of course, James
4 Pyne who is an attorney with the National Security Agency
5 Office of General Counsel.

6 **THE COURT:** Thank you very much. Thank you all for
7 coming. And I'll just say before I call on the defense to
8 introduce themselves for the record, this speaks to the effort
9 I have said all along that I thought NSA has made. This is
10 unrelated to just recent requests, but the ones even before
11 the trial got underway.

12 But now I've made these requests and I'll say demands for
13 some help if you will from NSA where it can be accomplished so
14 that a) I can understand what the issues are and b) if there
15 are any rulings that are required on the part -- requiring NSA
16 to produce information, that we can make sure we understand
17 how it can be accomplished as expeditiously as possible and
18 that we all work together towards that goal because this case
19 has to come to an end.

20 Counsel.

21 **MS. WEEKS:** Good morning, Your Honor. Crystal Weeks
22 of Weil Gotshal on behalf of defendant, Jacky McComber, who is
23 present in the courtroom. Also at counsel table is Patricia
24 Richman of the Federal Public Defender's Office and we are
25 joined on the phone by Alli Katzen of Weil Gotshal as well,

1 Your Honor.

2 **THE COURT:** All right, thank you all. You may have
3 a seat.

4 We had scheduled this continuation of a status conference
5 or discovery conference when we were in session on this matter
6 on the MJOA argument last week and we turned to discovery
7 issues. And I thought it would be fruitful if we convened in
8 open court rather than by telephone and could be joined by
9 representatives of NSA because there are some very pressing
10 issues, some of which pertain to exactly what has already been
11 produced, what was possibly ready to be produced, but
12 ultimately for whatever reason not necessarily produced, if
13 that is the case, because the trial got underway approximately
14 one year ago and ongoing issues and requests of the defense.

15 I thought I would begin by just reviewing at least
16 preliminarily what frames or what will frame today's
17 discussion. I'm going to start with ECF 401 which was a
18 letter from Ms. Richman dated January 4th of 2024 outlining
19 categories of requests on the part of the defense. And it's
20 been my understanding all along that the reason these document
21 requests have been made is that the defense argues they are
22 pertinent to the issue of the amount of loss and, of course,
23 the amount of loss is central to the Government's claims, it's
24 pertinent to calculating guidelines. And so the defense has
25 argued all along that if this material has not yet been

1 produced, it's entitled to it and needs it. The burden is on
2 the Government to prove loss, but they believe -- and I gather
3 this is from communications between the parties, there were
4 some earlier filings when sentencing was set for May of 2023,
5 that's what at least I've understood as being the catalyst if
6 you will, that the Government was making claims regarding loss
7 and the defense disputed it claiming that Ms. McComber did
8 more work off-site than the Government was giving her credit
9 for. And this is very much as I've understood it, an effort
10 on the part of the defense, the burden -- this isn't burden
11 shifting, but the defense has the right to challenge the
12 Government's contention and in its effort to do so seeks to
13 establish -- this is my understanding -- that she worked more
14 off-site than the Government has given her credit for in its
15 loss calculation. This is crucial because loss is a very large
16 part of the calculation of the advisory sentencing guideline
17 range.

18 So that's how this began, at least as I've understood it.
19 And ECF 401 speaks to categories of materials that the defense
20 believes would be relevant to its contention that, in fact,
21 Ms. McComber did do more work off-site than the Government has
22 given her credit for.

23 Then in preparation for today, first of all I had some
24 discussions at the conference last week about documenting by
25 formal order exactly what I was asking the Government to do.

1 There are transcripts. We've had a lot of status conferences,
2 but these submissions I'll just mention by ECF number, the
3 defense filed ECF 414 on January 26, that was Friday, I
4 believe, in anticipation of the conference noting that at our
5 hearing on January 23, 2024 I said we would address these
6 matters. The defense submitted a proposed order which it asks
7 the Court to enter to govern the search and production of
8 documents by NSA. And the draft order was submitted with ECF
9 414. The Government responded yesterday at ECF 416 with its
10 disputes concerning the proposed order.

11 So those two documents I think are important for today as
12 well. And there are a number of transcripts that are also
13 worth noting because they include discussions of some of these
14 topics.

15 I'm going to go by ECF number. The interesting thing is
16 that the dates don't correspond, so they're not sequential
17 exactly. But they'll be sequential in ECF number. ECF 406 is
18 actually January 9, 2024's telephone conference. ECF 410 which
19 is after 406 obviously, concerns a conference on January 5, so
20 that preceded by date, but not by ECF number. And then ECF 415
21 is the hearing, as well as discussions on discovery addressed
22 on January 23, 2024. So I have those transcripts here if they
23 should become important.

24 Before we get too far, though, I did want to just remind
25 everybody about what the topic is for which these documents

1 have been requested. And that, again, concerns the amount of
2 loss.

3 Under §2B1.1(b) of the guidelines, it's the obligation of
4 the sentencing court to calculate the offense level for a
5 defendant convicted of a crime involving fraud or deceit on
6 the basis of the amount of loss resulting from the conduct.
7 That's not a quote, but that's a paraphrase. That's what the
8 guidelines say. And as an example, I'll cite *U.S. v. Savage*,
9 885 F.3d 212 at 226 and that's a Fourth Circuit decision of
10 2018. Cert was denied by the Supreme Court. There are
11 several, many cases actually that stand for that proposition.

12 Loss amount is the greater of actual loss or intended
13 loss. The amount of loss is a factual determination, but the
14 key -- and I think this is very important for what's at issue
15 -- several cases say the same thing.

16 A sentencing court need only make a reasonable estimate
17 of loss given the available information as supported by a
18 preponderance of the evidence, not proof beyond a reasonable
19 doubt. But again, it's a fact-specific determination, but it
20 need only make a reasonable estimate. The *Savage* case says
21 that, the case of *United States v. Miller* says that, *Miller* at
22 316 F.3d at 503, also a Fourth Circuit decision.

23 And I think these are important principles because -- and
24 I commend and applaud the zeal with which the defense has
25 pursued these requests, but I'm worried that we have lost

1 sight of what's really at issue here. This is not the trial,
2 this is the sentencing phase. And the notion of the demands on
3 the Government to leave no stone unturned do not seem to me to
4 be necessarily within the framework that I just outlined.
5 Maybe I'm wrong, but that's what I discern from reading some
6 of these cases.

7 So I think we have to keep in mind as we go through this
8 today, what it is that is at issue because in this effort for
9 the defense to obtain these, the breadth and scope of the
10 documents it seems to want, I'm not 100 percent sure that this
11 is contemplated by what I've just outlined.

12 So we've already discussed the emails. There are issues
13 in the submissions about a notion that supposedly came,
14 according to the defense, from Ms. Peacy who disputes that she
15 said what the defense claims about what existed beforehand if
16 I got that right. It's one of the points you make, Mr. Gray.
17 There are a number of fact concerns about exactly what has
18 already been produced. And I've made clear this isn't a
19 do-over in terms of whatever it is Mr. Ahlers decided he
20 needed. Now we have all these new search terms and new
21 people. And I'm just not sure how that fits with where we are
22 at this stage of the case.

23 So I'm going to give everybody their chance to be heard,
24 most especially we've imposed on NSA to bring all these people
25 here because if I decide that there is entitlement and I did

1 already certainly address some of the points, but perhaps not
2 with the proper foundation of knowledge. I need to hear from
3 NSA about what's reasonable, feasible, et cetera.

4 So there were as I said, a number of fact disputes from
5 your two letters. Who would like to go first?

6 **MS. WEEKS:** Your Honor, the defense can go first.

7 **THE COURT:** Okay.

8 **MS. WEEKS:** Your Honor, just to start in terms of
9 the legal framework, we have been operating under that
10 foundation of knowledge on what's required and have been
11 operating from the premise that what the Government's original
12 sentencing submission stated in terms of loss was that Ms.
13 McComber was entitled to approximately 15 percent of the hours
14 she worked off-site which equates to 18 hours a month. So our
15 requests have been designed to determine whether NSA is still
16 in possession of documents that we, the defense, does not
17 have, that could rebut that reasonable assessment. Whether
18 it's reasonable or not, that's the question that we are trying
19 to answer. And we're operating from the understanding that
20 there were documents that were not turned over to the defense
21 before trial for the various reasons we've discussed at each
22 conference.

23 Your Honor ruled on January 9th that based on our ECF
24 401, the letter we proposed -- the request we proposed, that
25 we could narrow that down to 2C which was status reports

1 relating to the duties and responsibilities of the program
2 manager on the Ironbridge contract; 3, which was documents
3 relating to hiring and staffing for the Ironbridge contract.
4 We discussed that that can be very broad. And so Your Honor
5 asked us to work with the Government to come up with search
6 terms to really target that to documents that wouldn't have
7 been turned up by the prior searches that took place.

8 So Your Honor, I know Mr. Gray attached the spreadsheet
9 to his latest filing. I think this was ECF -- one moment --
10 ECF 411-2 includes a spreadsheet with search terms and it's in
11 black and white so it's hard to tell. But if I could plug in
12 here and show Your Honor if you're able to see, all we've done
13 -- so this spreadsheet, Your Honor, is what Mr. Gray sent to
14 us after the January 9th hearing of the search terms that were
15 previously ran by NSA for the documents that Mr. Ahlers and
16 the Government had agreed to search for prior to trial. We
17 don't have any information on how these search terms came
18 about. Mr. Gray said he would reach out to Mr. Cooch to try to
19 get more information. We never heard back. We asked Mr. Gray
20 several times, you know, what the capabilities of the NSA's
21 search abilities were so we could narrow these down even more.
22 We didn't hear back so we sent him our proposed search terms
23 which are only those in red, Your Honor. There's only seven
24 additional terms. And our understanding and I'm grateful the
25 NSA is here today to answer questions. My understanding is

1 that these documents that were previously collected are all
2 sitting in a repository and that it's relatively easy to just
3 run these search terms across those. We're only asking for
4 those in red, Your Honor. So "interview" -- and there's a
5 wildcard there, that's an explanation point. But "interview"
6 wasn't included before when they searched, "hir" and the
7 wildcard is intended to get at "hire, hiring, hired, brief,
8 badge, ECPRL" which relates to onboarding new candidates;
9 "PMR" and then this specific --

10 **THE COURT:** What, PMR?

11 **MS. WEEKS:** "PMR" is for the program manager review
12 and then this DI number is a specific form for the status
13 report we've been discussing. It's separate from the status
14 report, the technical status report that Mr. Gray often points
15 to with Jason Doyle. This is a contract data requirement list
16 requirement for a weekly status report. Those are all.

17 And so you will see down here there are -- it's the same
18 one for each custodian and these are the same custodians, Your
19 Honor, that were previously agreed upon. We did add the same
20 search terms below for Megan Collins, Sherrill Guinther, and
21 Rob Bryant because for some reason those weren't previously
22 ran, those same search terms weren't previously ran for those
23 custodians. And so we've asked that the same search terms
24 just be applied to those custodians.

25 But I think, Your Honor, we've tried to narrow this down

1 to get exactly at what you've ordered without it being too
2 burdensome. And, you know, Mr. Gray, we've asked him several
3 times if we can discuss these search terms. The first
4 objection we heard was in his filing yesterday, Your Honor. He
5 never responded to the email with search terms trying to ask
6 us how we can narrow it down even further. We are trying to
7 work with him but, I mean, we can only do so much.

8 And then finally, Your Honor, on the fourth request in
9 ECF 401 that you ordered be searched for was internal
10 communications related to the program management review that
11 was held in July, 2017 and any other PMRs held during that
12 relevant time period.

13 **THE COURT:** And any other what?

14 **MS. WEEKS:** Any other PMRs that may have been held.
15 There is some indication in some of the documents there might
16 have been more than one of those program management reviews,
17 so we're asking them conduct a search --

18 **THE COURT:** So here's what I want to ask you and I
19 should have said this perhaps earlier. Madam Clerk, can you
20 print 411?

21 **THE CLERK:** Sure.

22 **THE COURT:** So in preparation for the hearing I
23 spent a fair amount of time trying to be sure that I
24 understood what the law requires and I'm just going to mention
25 for the record some of the cases I looked at so everybody is

1 on the same page.

2 One is U.S. -- let me pull these out. And I ask -- I want
3 to mention these because I think some of the discussions are
4 important. *U.S. v. Trevino*, 89 F.3d 187 Fourth Circuit 1996 --
5 and these are not in any special order. *U.S. v. Caro*, 597 F.3d
6 608 which is a 2010 decision of the Fourth Circuit; *U.S. v.*
7 *Anderson* 481 F.2d 685, a 1973 decision of the Fourth Circuit;
8 *U.S. v. Fernandez* 913 F.2d 148 which is 1990 decision of the
9 Fourth Circuit; a First Circuit decision from 2017, *U.S. v.*
10 *Goris*, G-o-r-i-s, 876 F.3d 40; *U.S. v. Mandel*, a Ninth Circuit
11 decision in 1990 at 914 F.2d 1215; an Eastern District of
12 California decision from 2009, *United States v. Jack* at 257
13 F.R.D. 221; *U.S. v. George* at 786 F.Supp 56, a Royce Lamberth
14 decision from 1992; *U.S. v. Indivior*, I-n-d-i-v-i-o-r Inc., at
15 2020 WL 616167, a 2020 decision from the Western District of
16 Virginia; and the standard *U.S. v. Nixon*, 418 U.S. 683 (1974);
17 and *U.S. v. Maranzino*, M-a-r-a-n-z-i-n-o 860 F.2d 981 from the
18 Tenth Circuit in 1988. This wasn't all I looked at, but these
19 are the ones I printed and brought out with me.

20 So the reason I wanted to pause and talk about these is
21 in reading through some of these cases, some in different
22 context, obviously a Rule 17 subpoena context is not entirely
23 pertinent, but it reminded me, Ms. Weeks, I wanted to ask are
24 we under Rule 16? Are we under *Brady*? What exactly is the
25 basis for the request legally? And it matters because when

1 you just said words to the effect like we don't really know
2 what there is, that reminds me of starting with the *Nixon*
3 case, the fishing expedition is not what I'm supposed to
4 permit. So it needs to be focused. And now you have -- I'm not
5 saying that it's not focused, but really it's speculation on
6 your part as to what there is which is why it reminds me of a
7 pretrial phase instead of a sentencing phase.

8 So I guess I need you to explain to me what's the legal
9 authority for where we are? I understand that we're talking
10 about loss. I understand that. And I've tried to set that
11 stage, but now when you start talking about a search to find
12 what might be there and might not be there, and maybe there
13 are more -- we're not starting -- this will be important for
14 Mr. Gray to speak to, but it's not a blank slate. There has
15 already been discovery. I don't want to lose sight of that. So
16 now you want to go back and refine the search. And without any
17 knowledge of if some of these things exist or alternatively --
18 and some of the cases suggest this, some of these things if
19 they're not on the high side would be things that your client
20 could have. So it's sort of -- there's just a lot out there it
21 seems to me as I try to help guide where we're going and what
22 you really are entitled to.

23 **MS. WEEKS:** Understood, Your Honor. And if I stated
24 that we weren't sure of what exists I might have misspoken. We
25 have reason to believe based on the contract requirements that

1 there were status reports that were required and there was
2 trial testimony by Jon Smith that he never asked the defendant
3 not to do those and that they always received them. So we
4 don't have any of those.

5 **THE COURT:** What is "those" that you're talking
6 about?

7 **MS. WEEKS:** It's the -- I can show you the actual
8 status report that's required under the contract, Your Honor,
9 if I can get back in here.

10 **THE COURT:** And are those high side or low side?

11 **MS. WEEKS:** I don't know how to delete that.

12 **THE CLERK:** Ms. Weeks, at the bottom left of your
13 monitor you can tap that and it should clear that red mark. At
14 the bottom left.

15 **MS. WEEKS:** Of this actual monitor or this one?

16 **THE CLERK:** That one, yup.

17 **MS. WEEKS:** I can't for some reason, I can't clear
18 it here. I can't get it, but I don't think it's obscuring
19 anything important.

20 Your Honor, this is a requirement within the contract
21 data requirement list for the Ironbridge contract. And it's
22 got -- down here at the bottom I'll show you that it's a
23 document that was produced by the Government. It's marked USA
24 025736 and it was also produced -- yeah, that was produced by
25 the Government.

1 **THE COURT:** And it's dated in 2010, right?

2 **MS. WEEKS:** Right. So this is from the solicitation
3 of the Ironbridge contract and it's part of the contract data
4 requirement list that lists the requirements. And it states --
5 sorry, I just realized I'm showing the wrong requirement.
6 There were several requirements. Let me unplug for a second
7 and search, Your Honor. Apologies, Your Honor. The actual
8 Bates number is USA 027536. That's the one I just said. And
9 this is for -- you'll see here "status report." It's actually
10 this requirement, A013 status report and it says "frequency
11 weekly."

12 **THE COURT:** Show me where.

13 **MR. GRAY:** My screen is not on.

14 **MS. WEEKS:** Okay.

15 **MR. GRAY:** Ms. Herndon?

16 **MS. WEEKS:** Sorry that I don't have a hardcopy of
17 this with me.

18 **THE COURT:** It says blocks 11, 12, 13 and 14,
19 um-hum.

20 **MS. WEEKS:** Would it be possible for me to use the
21 Elmo?

22 **THE CLERK:** Yeah.

23 **THE COURT:** And they're under item 2 which is status
24 report.

25 **MS. WEEKS:** Yes, Your Honor.

1 **THE COURT:** Weekly.

2 **MS. WEEKS:** Yes.

3 **MR. GRAY:** I'm sorry, I can't see the date. It's
4 cut off at the bottom.

5 **MS. WEEKS:** The date of what?

6 **MR. GRAY:** This is a year before the contract
7 started.

8 **MS. WEEKS:** This is from the proposal for the
9 Ironbridge -- the request for proposal for the Ironbridge
10 contract, the requirements.

11 **THE COURT:** Now just to be clear, this is the
12 proposal, but isn't it the contract that matters?

13 **MS. WEEKS:** My understanding, Your Honor, is this
14 contract data requirement list is part of the contract. This
15 is part of a bigger document. I mean, we're happy to provide a
16 submission on it, but this is just -- I'm just using this to
17 show that we're not pulling this out of thin air and that
18 there was testimony that nobody asked Ms. McComber not to do
19 this weekly requirement, this status report.

20 **THE COURT:** Well, there was testimony that six
21 months went by without a request for a status report and then
22 Jason Doyle was asked by the defendant to complete it and
23 that, in fact -- this is the testimony and I'm obviously not
24 quoting it, that the defendant turned to Mr. Doyle to complete
25 the technical aspects of this status report because -- and she

1 noted that no one had asked for months.

2 **MS. WEEKS:** Yes, Your Honor. There are different
3 types of status reports. If I learned anything from working
4 for the Government it's that they love status reports. And
5 that one in particular was a technical status report that Mr.
6 Doyle helped put together as the technical lead. This is a
7 separate status report.

8 **THE COURT:** Well, are these classified?

9 **MS. WEEKS:** No, Your Honor.

10 **THE COURT:** Then why is it that the Government has
11 to produce them? Why wouldn't she have them herself?

12 **MS. WEEKS:** She doesn't have them, Your Honor.

13 **THE COURT:** Okay, but what's the answer to that? I
14 mean, in other words she's just -- do these cases suggest that
15 if it's equally accessible to both sides that the Government
16 then has to undertake this search? I mean, in other words,
17 this becomes complicated when they are classified, but it
18 seems like with all due respect and I don't understand the
19 operations of the agency, once it goes into the hands of the
20 agency it's treated either as for official use only or it is
21 classified. And retrieving it is not a simple matter. And
22 maybe the answer is if she doesn't have it but they do, that's
23 enough. Because I think Rule 16 says -- if you're under Rule
24 16 -- you didn't answer that yet, but I think Rule 16 says the
25 item is within -- this would be (f) -- well, that's reports of

1 examination and test. But no, let me look at (e), documents
2 and objects. The item was obtained from or belongs to the
3 defendant. So I suppose you could be under iii, Romanette
4 three, 16 -- this would be (a)(e) Romanette Three. If it's
5 *Brady* I don't know because I don't know that it would be
6 *Brady*. But if you thought it was *Brady* then I think the
7 Government doesn't necessarily have an obligation to produce
8 what she would already know about. Rule 16 seems broader.

9 **MS. WEEKS:** Yes, Your Honor. And we acknowledge that
10 there's mixed case law on this. I believe there's -- I can't
11 remember the case name, but a Judge Rakoff decision out of the
12 Southern District of New York where he found that Rule 16 does
13 extend to sentencing and requests after trial. We would submit
14 that it does. I don't think Rule 16 narrows it to the case in
15 chief at trial. It's anything that's material to the defense.

16 And just as we're arguing that *Brady* applies here too to
17 the sentencing phase, these requests that are designed to
18 attain documents that are relevant to the amount of loss as
19 Your Honor mentioned, it's significant here. They're asking --
20 the Government is seeking a 12-level enhancement for loss and
21 they've suggested that she should only be given credit for 18
22 hours a month off-site.

23 There are documents within the possession of NSA that I
24 saw myself last week when I reviewed them that show that she
25 was doing work off-site. And to the extent that they have not

1 been able to represent to us so far that they've turned over
2 everything they had related to that issue, we're just asking
3 for them to conduct a search, produce the documents, or
4 certify that they have none. That's all we've requested all
5 along.

6 And if Your Honor disagrees we just need a ruling. And
7 you've ordered now twice that the Government conduct these
8 searches and Mr. Gray is now objecting to those orders that
9 you've already made. And like I stated, we're trying to narrow
10 this down as much as possible and we're happy to work
11 together. Everybody here wants swift resolution of this.

12 **THE COURT:** So my concern though is we may not have
13 had the same understanding of exactly what was contemplated by
14 status reports. So that's one of the -- for example, when we
15 had the discussion I think January 9th, I was very clear that
16 my understanding of what would be relevant was different. Not
17 that you didn't accept the Court's ruling in this respect if
18 it was a ruling at all, but I wanted to draw a distinction
19 between work that was done that you were in my view attempting
20 to attribute to the defendant as captain of the ship versus
21 what she really personally did. And I'm only allowing, if I
22 was allowing anything, anything that would pertain to what she
23 personally did. And that's all I think that you would be
24 entitled to in the first place.

25 So my concern now though is that there isn't any actual

1 -- it's supposition or speculation, conjecture on your part
2 that there might be more, that you think there might be more
3 because they were supposed to do status reports. And my
4 concern was making sure I'm not asking the Government to redo
5 what it did already because some of this I would have thought
6 was captured in earlier productions. And the fact that you
7 don't have what you want doesn't mean there's more to produce.

8 **MS. WEEKS:** Right.

9 **THE COURT:** I mean, in other words, there's also
10 evidence that this many years into the contract, that date you
11 just showed me was 2010. The relevant time period is years
12 later, 2016 and 2017 almost towards the end of the contract
13 that the rules were not necessarily strictly applied. In fact,
14 that's what the testimony would support that at least whatever
15 kind of status report that was that the defendant asked Jason
16 Doyle to prepare, what kind of status report was that?

17 **MS. WEEKS:** That was a technical status report, Your
18 Honor.

19 **THE COURT:** And what kind of status reports are
20 these?

21 **MS. WEEKS:** That's a program management status
22 report.

23 **THE COURT:** Have you ever seen any program
24 management status reports?

25 **MS. WEEKS:** Have I seen them?

1 **THE COURT:** I mean, yes. In other words --

2 **MS. WEEKS:** They've not been produced, Your Honor.
3 And they were required under law in the contract to maintain
4 those in the COR file. We don't have them. So that's why our
5 search terms were narrowly tailored to include this specific
6 form number to do one last effort to search for those
7 documents that would talk about Ms. McComber's performance on
8 the contract and what's she's done. Those are comprehensive
9 reports about how the contract is performing, the hours
10 expended, the status of the work. And we suggested terms that
11 would not have been captured by the previous searches to try
12 to avoid the NSA who has been doing a lot of work in this case
13 and has done, we don't dispute that, to make it easier on
14 them. And Mr. Pyne suggested last hearing that it was
15 relatively easy to run the search terms.

16 **THE COURT:** So let me ask you about under 2,
17 technical status reports for the Ironbridge contract. Why
18 would that have anything to do with the defendant?

19 **MS. WEEKS:** Your Honor, you ordered only C, 2C.
20 You've already --

21 **THE COURT:** Okay.

22 **MS. WEEKS:** You've already denied our request for
23 those documents. We're focused on any other weekly or monthly
24 status report relating to the duties and responsibilities of
25 the program manager.

1 **THE COURT:** Let's go over 401 then because that's
2 still when I say "all," all that you're seeking is what's in
3 this 401, right?

4 **MS. WEEKS:** Yes, 401 2C is what we're talking about,
5 Your Honor.

6 **THE COURT:** So are you satisfied with the email
7 production?

8 **MS. WEEKS:** The email production is a separate
9 issue. The documents that Ms. Katzen and I identified we have
10 not yet received those. We're hoping to hear from NSA today on
11 the status of that production.

12 **THE COURT:** Okay. And then performance evaluations,
13 number one. I just want to make sure everybody here hears the
14 same thing about what it is you're seeking.

15 **MS. WEEKS:** Your Honor, on 401 our understanding
16 based on your ruling on January 9th is that the only searches
17 that you've ordered be performed are for 2C 3 and 4. I think
18 you had already said that we weren't entitled to number one.
19 Happy to revisit that if you changed your mind, but --

20 **THE COURT:** No, because it was too broad. It was for
21 the Ironbridge contract.

22 **MS. WEEKS:** Yes. We've narrowed it down to 2C 3 and
23 4.

24 **THE COURT:** Okay. So you made a claim -- let me pull
25 out 414. You made a claim in this proposed order that looking

1 at ECF 414-1, paragraph (b), that NSA is in possession of
2 documents that have been collected, reviewed, and redacted
3 before trial. You call this the previously redacted materials
4 but which were never produced to the defense. And then you
5 want me to order NSA to expeditiously produce them, separate
6 and apart from other materials. I'm not sure where you're
7 going with that. But that was what you said.

8 And that will be a topic I want Mr. Gray to address
9 because in his submission at 416 he, I think, was disputing
10 that the comment was ever made in the first place, if I have
11 the right one. I think that's the one.

12 Before I call on Mr. Gray, was there anything else you
13 want to tell me?

14 **MS. WEEKS:** Yes, Your Honor. With respect to that
15 issue in particular, as 414-1 states at sub-paragraph (b) that
16 you are reading from, "Defense counsel" -- would be me --
17 "relayed to you that during our visit to NSA we were informed
18 that NSA is in possession of a set of documents that had been
19 collected, reviewed, and redacted."

20 I never stated that those had been turned over to Mr.
21 Gray and not produced to us. It was simply our impression from
22 my conversation with Ms. Peacy that there may have been
23 documents in their possession that had been reviewed and
24 redacted and never produced. She said that in the context of
25 being able to determine whether any of the emails that Ms.

1 Katzen and I had identified on January 22nd might have been in
2 those documents and thus, easily produceable. That's simply
3 all that was stated on that and I look forward to hearing from
4 Ms. Peacy on the clarification of that and at what point Mr.
5 Gray learned of the existence of those documents if they
6 exist.

7 And in terms of keeping them segregated from other
8 documents, we do -- we would like to know what documents, if
9 any, were in the possession of the Government before trial
10 that were not produced to the defendant.

11 **THE COURT:** And the reason you want to know that?

12 **MS. WEEKS:** For protection of our client's
13 constitutional right to due process.

14 **THE COURT:** Okay, thank you. Anything else?

15 **MS. WEEKS:** No, Your Honor.

16 **THE COURT:** Thank you, Ms. Weeks.

17 Mr. Gray.

18 **MR. GRAY:** Yes, Your Honor.

19 **THE COURT:** So just before you get started, just to
20 keep in mind I do want to know about the emails and where we
21 stand on that, among other things.

22 **MR. GRAY:** Yes, Your Honor. So we don't forget, let
23 me address that right offhand. To begin with, I just want to
24 briefly state the whole history of this issue.

25 **THE COURT:** The what? I'm sorry.

1 **MR. GRAY:** The history of this issue. As the Court
2 knows, we initially turned over what we thought was the
3 complete set of emails in August of 2021. That was about three
4 months after the arraignment. In the argument on the motion
5 for Bill of Particulars on December the 1st of 2021 I stated
6 here in this very court in the presence of Mr. Ahlers, that a
7 lot of the questions he was raising could be addressed by
8 looking at that email production. There's no evidence that Mr.
9 -- apparently, that Mr. Ahlers and his client like took the
10 emails at all seriously until we discovered during the motion
11 hearings in the summer of 2022 that there was a problem with
12 the production and that the production was not fully complete
13 because of a technical problem. Up until that point --

14 **THE COURT:** Could you just elaborate? Wasn't
15 complete because of a technical problem meaning the flash
16 drive, for example, was defective or because you didn't give
17 them everything you really had?

18 **MR. GRAY:** The production as it was generated seemed
19 to involve as I understand it, I was not involved in the email
20 side of things, I had more than enough to do as the Court
21 knows with dealing with Mr. Ahlers' various motions and briefs
22 and I think it was six days of motion hearings in the summer
23 of 2022 during which this came up. But as I understand it, it
24 was something that caused the production to include only the
25 first several days of each month and the last several days of

1 each month.

2 But what that means is if the defense had looked at them,
3 they would have identified the issue very quickly and gotten
4 back to us. And they never actually identified the issue. It
5 was we who in the course of looking at that production again
6 during the motion hearings discovered the problem and raised
7 it with the Court.

8 So then in the late fall of 2022, as part of trying to
9 deal with that issue before trial, we said -- we said to Mr.
10 Ahlers and to his client, "Why don't you come out, review all
11 the emails yourselves on our computers and then we'll get
12 those produced before the trial date. We'll certainly try to
13 get them produced before the trial date."

14 Well, the first thing that happened is Mr. Ahlers
15 declined to accompany his client to go out there. As Mr. Pyne
16 explained to me at the time, part of the reason why they had
17 made special arrangements to try to have Mr. Ahlers come out
18 there with Ms. McComber is because they thought he might
19 exercise a restraining influence on her and that she would not
20 just make a blanket demand for the emails which the NSA would
21 be incapable of dealing with. But Mr. Ahlers decided he didn't
22 want to go out there and look at the emails.

23 The defense keeps talking about "We have reason to
24 believe." Well, I think in light of the fact that Mr. Ahlers
25 didn't think it was worth his time to go out there and look at

1 those emails for a couple of days, we have reason to believe
2 that he already suspected it would be a waste of his time.

3 So on December the 7th and December the 9, 2022 we did
4 allow Ms. McComber to go out there and review the emails. And
5 Your Honor I think knows what resulted from that, exactly in
6 connection and -- exactly consistent with what Mr. Pyne had
7 feared, she requested production of 1,315 emails. And I still
8 need to get to you, to the Court and also to defense counsel
9 since they -- I'm not sure if they saw it when they were out
10 there or not, I would think they did, her list of what she
11 wanted. Because when you go down to it, especially for the
12 final months that she was program manager, almost none of it
13 is emails that were specifically directed to her. Many of them
14 were NSA all emails or National Security Operation Center all
15 emails. That means going out to everyone in the NSA or
16 everybody in NSOC, not anything that was specifically focused
17 on her.

18 **THE COURT:** When are you going to get that to them?

19 **MR. GRAY:** Huh?

20 **THE COURT:** When are you getting that list to them?

21 **MR. GRAY:** I can get that -- well, for one thing I'm
22 pretty sure actually that Ms. Derrow saw it when she was out
23 there in December. And I'm not sure, I think I got it some
24 time in January. And I'll be glad to get that over to them.
25 It's not small. It's like 60 or 70 pages because it lists

1 1,315 emails. It goes on for pages, many, many pages.

2 So after Ms. McComber was out there and demanded these
3 1,315 emails, what happened a month later? She decided to
4 waive production of those, any further production beyond what
5 the Government already had in progress. And Mr. Ahlers signed
6 off on that.

7 And a huge problem in this case, Your Honor has accepted,
8 I'm sorry to say I think far too readily, the defense's claim
9 that oh, well this is now, this is now sentencing so we can
10 renew and advance different discovery demands and we can
11 completely ignore our client's and her then counsel's knowing,
12 counseled, fully aware, very solemn waiver of further
13 discovery productions that took place prior to the trial.

14 And as I was sitting here over the weekend just
15 contemplating where we stand in this case, I mean, it struck
16 me that that is one of the most troubling things about how we
17 happened to be here. Because the defense just blithely says,
18 "We're not bound by that prior waiver. Our client is not bound
19 by her own knowledgeable, counseled, prior waiver."

20 And so I ran a search. I turned up one case from the
21 Northern District of Georgia called *United States v. Lawrence*,
22 2019 Westlaw 3006620.

23 **THE COURT:** What's that, 29 Westlaw what?

24 **MR. GRAY:** 2019 Westlaw 3006620. And it says the
25 following: This case had dealt with the legality of a search

1 and it says, "The defendant has abandoned" -- it says, "It is
2 evident from the filings, defendant's counsel" this is just
3 the counsel, the defense lawyer -- "considered challenging the
4 legality of the stop but ultimately elected not to do so. In
5 his reply brief filed after the evidentiary hearing, defendant
6 did not challenge either 1) the Government's contention that
7 the defendant had abandoned any challenge to the search; or
8 2), the Government's argued that based on the evidence
9 presented at the hearing the search was constitutionally
10 valid. The defendant has abandoned his right to challenge the
11 legality of the search. See *New York v. Hill* 528 U.S. 110, 114
12 to 115, holding that the defendant is bound by the acts and
13 decisions of his counsel except those relating to certain
14 fundamental rights. Followed by *Hill versus Jones* an Eleventh
15 Circuit decision --

16 **THE COURT:** You don't have to go on because I don't
17 think you're telling me anything anyone here doesn't already
18 know. That's not a novel proposition. There's cases that say
19 things like that. I disagree with you to this extent, I don't
20 think the waiver, if any, the abandonment, if any, extended
21 beyond issues pertinent to the trial and what defense counsel
22 contends. And I think this is -- this part I agree with them
23 about. We're in a new ball game. This is the sentencing. An
24 issue at sentencing, a central issue is the amount of the
25 loss. And what they're claiming, now I don't know that I

1 agree with them on their entitlement to everything they're
2 claiming, but the foundation of their claim is this: To the
3 extent there even was a waiver, it did not extend to a new
4 issue at the sentencing phase concerning the amount of the
5 loss. So I just don't think that -- there was nothing before
6 me that said if the decision was made to go to trial with what
7 they had and I believe that decision was made, that that
8 foreclosed a later right to seek information pertinent to new
9 issues that evolved concerning a totally separate phase of the
10 trial; sentencing, where I have to calculate the amount of the
11 loss. And the parties disagree and it's a fact-intensive
12 determination. I don't have to be 100 percent certain, but I
13 have to be in the ballpark. It has to be -- I have to have a
14 ground for whatever loss I determine.

15 And their claim is they disagree that she only worked 18
16 hours a month which is what you wanted to give her credit for
17 off-site and that there are records that will show it.
18 Whatever happened before the trial does not foreclose their
19 right to make that argument. And to do so they're seeking
20 documents. Now what documents and whether their request is
21 reasonable and appropriate is a different issue.

22 **MR. GRAY:** Your Honor, I think what Your Honor is
23 missing with regard to that is for one thing, there was
24 serious detrimental reliance by the Government on that waiver
25 because we stopped the production at that point in time.

1 And Your Honor, I was reviewing that January the 10th
2 transcript the other night. You and I have had some back and
3 forth discussions about this. And what I had told you in the
4 past --

5 **THE COURT:** January 10?

6 **MR. GRAY:** January 10 of 2023.

7 **THE COURT:** Oh, okay. I thought we were in 2024.
8 That's why I wasn't -- yeah, definitely make sure. This case
9 is so old that you better make sure you say the year.

10 **MR. GRAY:** Right. We also had very significant
11 events in this case in January of 2022. So it's now been the
12 second anniversary now of Mr. Ahlers' learning about the
13 famous Garrett Bosshardt email that he viewed as being so
14 critical. But let's finish this up.

15 I moved for a continuance of the trial apparently in
16 early January. And what I said in the hearing on January the
17 10th --

18 **THE COURT:** January 10th of 2023.

19 **MR. GRAY:** We said if we proceeded to trial with the
20 various demands of the defendant not having been fully met,
21 that I was concerned -- and I expressly cited "appellate risks
22 and 2255 risks" that would arise out of that. I felt that we
23 were opening ourselves up for that. And the status of
24 things --

25 **THE COURT:** Well, that's clearly on the minds of

1 defense counsel I'm pretty confident.

2 **MR. GRAY:** Oh, this defense counsel? Yes, Your
3 Honor. Quite frankly, I think an awful lot of what we're
4 seeing here has relatively little to do with any realistic
5 expectation of finding material evidence that would reduce the
6 amount of the loss and a desire to make a *Brady* issue that
7 will give them an issue on appeal that they certainly don't
8 have now. And that's exactly the reason why the defense was
9 asking for that passage that you thought was kind of strange.

10 Why are you saying you want to know exactly when the
11 Government got this information and how long they had it? And
12 Ms. Weeks gave you a very general and ambiguous answer about
13 "We're just trying to protect our client's constitutional
14 rights."

15 **THE COURT:** Well, it wasn't lost on me. That's why
16 I asked the question.

17 **MR. GRAY:** Right, exactly. What this is totally all
18 about is if they can find something that suggests that we had
19 something before January the 10th that we didn't turn over,
20 then they've got an issue that they can use to attack the
21 trial itself. They can claim there was a *Brady* violation in
22 advance of the trial. And that won't just go to sentencing,
23 that won't just go to the amount of loss.

24 **THE COURT:** Well, Mr. Ahlers always argued that all
25 of this that he sought, whatever it was that he sought, his

1 argument always was that it was *Brady*. I kept disagreeing with
2 him because I don't see how this fit any definition of *Brady*
3 that I understood. But that -- that is what he argued.

4 **MR. GRAY:** Sure. Because what he was trying to --
5 for one thing, *Brady* these days for defense counsel is just
6 like catnip. They all want to try and find some *Brady*
7 violation that they can hang around the neck of the Government
8 for all sorts of reasons, including their professional
9 standing and in the defense community and various other
10 things. So yes, they always say that.

11 But, I mean, *Brady* is actually a pretty limited doctrine.
12 I mean, one of the most fundamental aspects of it -- and Ms.
13 Richman I'm afraid we've discussed this before, just does not
14 seem to process this -- is that what it involves is
15 suppression of exculpatory evidence by the Government that
16 would tend to show that the defendant is not guilty.

17 I mean, the original *Brady v. Maryland* case if I recall
18 correctly involved a situation where I think it was a bank
19 robbery where the defendant knew that a witness had identified
20 somebody else as the culprit and didn't divulge that. Of
21 course that is, you know, it would be a serious constitutional
22 violation.

23 What we are talking about here, what is passing under the
24 supposed rubric of *Brady* here, first from Mr. Ahlers and now
25 from the defense here, the new defense counsel, is that if we

1 can find some email that we can say indicates that she sent a
2 two-line email from off-site -- which by the way they
3 certainly should have access to themselves, then that would be
4 exculpatory. Of what? I mean, it might indicate that she did
5 what, two minutes of work? Okay, two minutes of work. That
6 would take about five dollars off the amount of the loss here.
7 I mean, it's beyond immaterial.

8 And so I want to get to this. I mean, Ms. Weeks focuses
9 in her argument this morning on the off-site time. The
10 Government only gave her credit for 18 hours a month of
11 off-site time. As I indicated, I think that 18 hours, I think
12 that's a gift.

13 It is so ironic that when we put together our loss and
14 restitution statement back in late April of last year, we
15 tried to make every reasonable allowance. I mean, the overall
16 amount of the time that was billed is something like 380,000
17 hours and we said we would give her credit for two-thirds of
18 her time in Access Control and I think 15 percent or so of her
19 time out of Access Control. So the total that we gave her
20 credit for was in the range of 30 hours a month. That would be
21 like roughly four full days of work a month as program
22 manager. We've heard nothing that suggests that she did
23 anything like that.

24 The defense, as I said, keeps saying, "We have reason to
25 believe." But even aside from the waiver issue which, I

1 mean -- and I need to finish on this because when they made
2 that waiver on January the 10th, we were nine days away, eight
3 days away from jury selection. Barely two weeks away from the
4 beginning of trial. For months our efforts had been diverted
5 into chasing these will of the wisps of supposed exculpatory
6 evidence. We had been in six days of hearings in this case
7 before we even got to trial, maybe longer when you factor in
8 the various motion hearings. And so we were really -- then as
9 you know, the defendant filed a Motion in Limine on the Unanet
10 matters, Unanet documents that's discussed in the January 10th
11 transcript, like, shortly before Christmas. So crazily, time
12 over Christmas that I should have been able to spend getting
13 ready for trial, I was spending getting ready for a motion in
14 limine argument on that that was right after the new year.

15 So we could not -- when this came down, we had to turn
16 our attention immediately to getting the case ready for trial.
17 We couldn't say all right, we want to document exactly where
18 we are, we want to find out exactly which of these folks are
19 still in -- which of the custodians are still in process. And
20 that is part of the reason why the record is so confused now.

21 And it's extremely revealing that what I began suggesting
22 about a month ago that clearly this case cannot finish in the
23 District Court without our assembling a file that lays out
24 clearly, easily, and directly so the Court of Appeals can
25 understand it, exactly what had been produced to the point

1 where the defense pulled the plug and what still remained.

2 And when I raised that, the first thing Ms. Richman says
3 is "Oh, that's unnecessary because we had a hearing on
4 December the 21st, so that's what I think that was about." The
5 hearing on December the 21st was not remotely comparable to
6 anything --

7 **THE COURT:** December 21st of 2023.

8 **MR. GRAY:** 2023, right. I think there is -- I think
9 it's perfectly clear that that's a lot of what is driving this
10 is the desire to create some kind of *Brady* or Rule 16 issue
11 for purposes of the appeal.

12 Let me see -- let me continue, yes. There's so many
13 things I want to get to. It's going to take a while this
14 morning, Your Honor. This is so significant because it shows
15 how lost and mindless, futile minutia we have gotten in terms
16 of the discovery issues. And this goes directly to the
17 emails.

18 And by the way, I guess I didn't say this, we have
19 received the emails as I understand from Mr. Pyne. The
20 members of Mr. Keefe's section worked through the weekend, the
21 weekend before last to get these reviewed and produced to us.

22 **THE COURT:** So these are the 400 or the --

23 **MR. GRAY:** They ultimately asked for about -- I've
24 heard different figures, 75, 85 --

25 **THE COURT:** The revised list.

1 **MR. GRAY:** To call them individual emails as Mr.
2 Pyne would correct me is --

3 **THE COURT:** Mr. Pyne told us they really --

4 **MR. GRAY:** They're chains.

5 **THE COURT:** --were chains. So it's not just a
6 discrete 60 emails. Some of them are lengthy.

7 **MR. GRAY:** Right.

8 **THE COURT:** Because they're chains.

9 **MR. GRAY:** Right. So even aside from the fact that
10 the defendant and her counsel chose to go to trial originally
11 without having gotten the supposed -- well, actually received
12 a number of emails because there were searches going on using
13 the keywords and any emails of any of the identified
14 custodians relating to those were produced on a rolling basis
15 over the fall of --

16 **THE COURT:** Right. I mean, I don't want it to
17 appear as far as I'm concerned that NSA wasn't producing
18 documents until the 11th hour and 59 minutes. They were.

19 **MR. GRAY:** Right.

20 **THE COURT:** In response to the Court's August 2023
21 order.

22 **MR. GRAY:** And not only that, but they were
23 producing emails and a substantial number of emails were
24 introduced as I think three different -- parts of three
25 different exhibits at trial.

1 But with regard to the -- and Ms. Weeks --

2 **THE COURT:** So--

3 **MR. GRAY:** May I finish Your Honor?

4 **THE COURT:** No. I want to ask you this: Of the 60
5 or so emails that are ready, were any of those -- are these
6 all brand new, none of them were ever produced before, do we
7 know?

8 **MR. GRAY:** We'd have to do a comparison and I
9 haven't even finished looking through them myself. I was
10 trying to do that over the weekend. But a number of them
11 looked very familiar to me.

12 **THE COURT:** A number of them what?

13 **MR. GRAY:** A number of them looked very familiar to
14 me. And I can tell you the ones that I've gotten through so
15 far, some of them are things like, "Dear Ms. McComber we need
16 you to do such and such to get access to the computer system."
17 Stuff like that.

18 **THE COURT:** Okay. So -- but I was just curious
19 because I think it's arguably important, are these brand new
20 or are these a duplicate of what was already produced in whole
21 or in part?

22 **MR. GRAY:** I suspect, Your Honor, that some of these
23 have previously been produced. It may be that some of them
24 have not. You know, when you see the list of the emails that
25 were requested by the 1,315 emails that were requested by the

1 defendant when she was out at the NSA in December of 2021, you
2 will see red notations from I believe -- maybe not Ms. Peacy,
3 maybe Maxine Meade, from Maxine Meade that reflected that she
4 was beginning to try and track down where these emails were so
5 that those could be produced and then the plug got pulled and
6 she stopped. That was like -- I think maybe she was about 40
7 or so emails into that process at the time.

8 But they're going to have these emails within a couple
9 days that they requested. And in the end they boiled it down
10 to about 85 chains of emails which we think would be helpful
11 and it will be important for us to look at those and see how
12 material those actually are.

13 This gets into the well, what is the issue of materiality
14 with regard to these emails? At the hearing last week when I
15 tried to make the point that all of these emails that we're
16 looking at out there are high side emails, Ms. Weeks objected
17 to that. She said, "No, no, no, no, no, many of these are
18 unclassified. These are unclassified emails. They're different
19 from the high side emails." That's not right. The high side
20 emails fall into two categories. The high side emails first
21 and foremost are anything that are sent to or from the secure
22 computers at the NSA. They can be either emails that carry a--
23 documents that carry a classification rating or they can be
24 emails that are UF//OUO, Unclassified For Official Use Only.
25 In other words, things that haven't been through

1 classification review yet, but have to go through
2 classification review before they can be released outside of
3 the NSA.

4 So we as part of our -- and Your Honor may want to go
5 back and take a look at it because it was last April, our loss
6 and restitution filing we said okay, there's about 270
7 some-odd hours of time that she spent in Access Control at the
8 NSA. In Access Control, not necessarily in NSOC. And some of
9 that time we could identify as having spent at a different
10 part of the facility on the other Silent Roar contract that
11 InfoTeK held. I think we identified about 15 or so hours that
12 we could definitely say was related to Silent Roar.

13 And then we noted that it's a fairly long hike from where
14 you make your entrance to the NSA to where NSOC is. I think
15 typically based on the records it looked like it took her
16 about 20-plus minutes to do that. So we take that time out,
17 that slices off about another 60 hours. We didn't take off
18 time for anything else.

19 And actually and as I pointed out just recently in the
20 trial itself under her cross-examination by Mr. Cooch, after
21 we had introduced evidence showing, for example, that she
22 would engage in lengthy back and forth instant messages with a
23 man she was then dating who also worked inside NSA, the
24 defendant admitted that you could not properly bill for all of
25 the time she spent in Access Control.

1 And on top of that, we had testimony from Mr. Bryant, the
2 head of the K3 section in NSOC that most of his conversations
3 to Ms. -- with Ms. McComber just related to like discussing
4 sports. So the idea that we have spent as much time as --

5 **THE COURT:** I don't want to really focus on the time
6 at NSA because I don't really think that's the issue. It's the
7 time off-site that we're talking about.

8 **MR. GRAY:** Oh, Your Honor, the time at the NSA
9 though, it goes to the claim that we have reason to believe
10 the 70 or so hours that we took out of her time on-site at the
11 NSA which is the only thing the high side emails could relate
12 to, I think if my math is right that would amount to about
13 \$7,500 worth of billings or something like that. I mean, it's
14 clearly -- against the total amount that's at issue here, it's
15 extremely small. And given the parameters of the law relating
16 to determining the amount of the loss it's immaterial.

17 And this has -- I mean, I had to go out to the NSA to
18 look through these, to identify what was there. I've sent two
19 detailed letters as the Court knows to the defense back in
20 early December trying to facilitate their review of these
21 documents. We produced an Excel spreadsheet to them in advance
22 of Ms. Derrow going out there to show -- that showed the
23 number of emails and number of instant messages that she sent
24 on any day she was in Access Control. So you can zero right in
25 on those. And that document is damning in and of itself

1 because of how relatively few emails there are that are on it.

2 So let me get to some other things. I want to sort of go
3 back to the -- I got to go back to the beginning of Ms. Weeks'
4 remarks and then I have yet what I intended to be my own
5 remarks.

6 The two cases that Ms. Richman cited with regard to oh,
7 discovery applies at the sentencing context as well, one of
8 them I recall as being totally clear that there was a guilty
9 plea in that case. And of course with guilty pleas, and if the
10 guilty plea happens early enough, discovery is not required
11 and may not have been turned over. So first that decision was
12 just to indicate that okay, the guilty plea has been taken
13 now, but that now means she's got to cough up the discovery.

14 There is no distinction between what is involved in
15 trying to show whether she spent material time working on this
16 contract during each month that was covered by a charge in the
17 indictment and what is going to be demonstrated at sentencing.
18 That's not -- that is not the distinction. We would never and
19 certainly we did not here, we would never hold back anything
20 from our initial production to defense because we say "Oh,
21 that's not a guilt/innocent issue, that's a sentencing issue
22 if we get that far." We would never do that. And not only
23 here, as I've said before, they're opposite faces of the same
24 coin. Anything that is relevant to show that she did a
25 material amount of work on the contract for purposes of

1 showing that she didn't submit a false claim is material for
2 the exact same reasons with regard to determining the amount
3 of the loss. Indistinguishable. Absolutely indistinguishable.
4 And she and her counsel were willing to waive further
5 production of those last January.

6 Another thing that makes this case absolutely --

7 **THE COURT:** I don't know if I agree with that
8 because the focus at this stage is establishing -- you didn't
9 need to prove your case, get into the particulars of how much
10 if you establish that her bills were materially false.

11 **MR. GRAY:** Right. But the defense in order to show
12 that she had -- that her bills were not materially false was
13 entitled to any evidence that we had that we knew of that
14 showed she worked. So it's not a function of what we had to
15 prove, it's a function of what the defense was entitled to.
16 And so that's why we did not withhold anything to our
17 knowledge that showed her doing work prior to the trial.

18 **THE COURT:** I guess my point would be I understand
19 that you didn't withhold, but what they're saying is you also
20 didn't conduct the kind of search that they think is more
21 focused, at least that's the allegation. That all of these
22 kinds of categories of material were not explored.

23 **MR. GRAY:** Your Honor, I think -- actually, they may
24 be trying to suggest that because defense lawyers love to
25 suggest that the Government is incompetent and it's negligent,

1 its people are not thorough. I mean, the fact that whoever
2 drafted the defense's order put that footnote number one on
3 there trying to get the Court to sign off on something that
4 made it sound like the NSA wasn't treating this seriously and
5 had just been casual about it and that -- I mean, I am beside
6 myself what the NSA has been put through in this matter and
7 how -- and one thing that we're going to need to do, Your
8 Honor, is to file a number of the examples of these redacted
9 documents with the Court so you can see exactly how time
10 consuming the redaction and review process is. This is not a
11 joke. This is not a matter of anyone being sloppy, or
12 negligent. These are people who work for an incredibly
13 important and sensitive government agency applying the same
14 kind of due diligence that Ms. McComber -- Ms. Richman
15 repeatedly feels that she feels obliged that she feels to
16 display in the course of her work. These are people who are
17 being every bit as diligent on that.

18 So then let's get to what I was going to say a moment
19 ago. A huge distinction in this case that will stand out in
20 anything that is in the federal reports is the sheer amount of
21 testimony that is already available to the Court, the
22 Government, and the defense to assess how much work was done
23 by the defendant.

24 **THE COURT:** I said that all along.

25 **MR. GRAY:** I'm sorry?

1 **THE COURT:** I've said that all along.

2 **MR. GRAY:** But Your Honor, it is such a weighty
3 factor in the equation in determining whether these requests
4 are -- they have to be reasonable. They still have to be
5 reasonable, Your Honor.

6 Your Honor suggested last week that "Well, it's clear
7 that these requests are probably not proportional to the cost
8 of what's going to be involved in coming up with it."

9 **THE COURT:** Well, on page 42 of ECF 406 I said, "If
10 you come back to me and say their requests are either
11 unreasonable or frivolous I'll have to hear you out, but if
12 their requests are reasonable then somebody is going to have
13 to work extra and get this done."

14 **MR. GRAY:** Right. And that's why I made it very
15 clear in my comments in response to the defense's draft order
16 that we strongly submit that defense counsel's requests are
17 not only duplicative of past productions, but are frivolous,
18 abusive, irresponsible, and unreasonable given the substantial
19 burden they impose on the NSA and the minimal or wholly
20 nonexistent probative value these requests have with regard to
21 the loss determination issue in this case. When I looked at it
22 afterwards I thought I should have also thrown in or added
23 "futile" and "frivolous."

24 We have 2,000 pages of NSA investigative transcripts of
25 people talking about what Ms. McComber did and didn't do

1 before we even got to the trial. That included information
2 from 41 different witnesses.

3 **THE COURT:** I know you've said that before and that
4 certainly is a part of the investigation, but I don't see that
5 as a substitute for documents, if there are any. I mean, I
6 think you should focus on the documents, if they exist or they
7 don't exist. And what was done -- I don't want the NSA to
8 repeat anything it's already done. I couldn't have been more
9 clear about that. I've said that. If this has been produced or
10 this search has been conducted, that's the end of it. I was
11 trying to find out what was done, have these searches been
12 undertaken. I know you have those interviews, that was all
13 part of what I heard before, during, and after the trial. But
14 that's not -- that's apples and oranges to me.

15 **MR. GRAY:** It's not apples and oranges.

16 **THE COURT:** It is. You don't get to choose. If you
17 have witnesses who say X, but a document would show Y, the
18 fact that you have a witness who says X does not obviate the
19 need for the document if it exists or if it's reasonable to
20 procure it.

21 **MR. GRAY:** Right. This goes to whether there is any
22 reason to believe such documents exist. And when you have
23 somebody like Tiffany Starr-Smith who testifies at trial that
24 the administrative burdens that involve this contract period,
25 much less anything that could be done off-site would be

1 minimal, that is huge. That goes directly towards the issue of
2 do these documents even exist.

3 And so let's turn to the issue that -- and for one thing,
4 maybe we should just pause for a moment here. Ms. Peacy, do
5 you want to perhaps come up to the microphone and address the
6 issue of what you believe you said?

7 **THE COURT:** And please state and spell your name for
8 the record.

9 **MS. PEACY:** Ms. Holly Peacy. H-o-l-l-y P-e-a-c-y.

10 **THE COURT:** Ms. Peacy, what do you recall that you
11 stated to Ms. Weeks when she was out there a week ago
12 yesterday on the 22nd of January with regard to the status of
13 the productions at the point where the defense said they
14 wanted to go to trial?

15 **MS. PEACY:** The comment I made was that I did not
16 know what had been produced to the defense because the OIG
17 produces it to the AUSA's office. After that we're out of
18 that process, but that I had copies of everything that had
19 been produced to the AUSA's office and NSA maintained those
20 copies.

21 **THE COURT:** Wait, you lost me. I'm sorry, Ms.
22 Peacy. You said OIG produces to the AUSA?

23 **MS. PEACY:** Yes. The AUSA documents were produced by
24 the Office of the Inspector General at my office, to the AUSA.
25 After that we are out of that process. So we're not involved

1 in any of the AUSA's process for what gets turned over or
2 doesn't get turned over. I have no knowledge of that process.

3 **THE COURT:** Okay.

4 **MS. PEACY:** So what I said was I did not know what
5 was produced to the defense, but we have copies and maintain
6 copies of all of those and I can look through all of those
7 that we had that had already been redacted against the list of
8 emails that they were requesting to see if any of those had
9 already been redacted in an effort to save us some time.

10 **MR. GRAY:** So that goes to your question. But that
11 was a week ago and in the end the decision was made regardless
12 of whether there was duplication, just to go ahead and produce
13 everything they wanted. Right? Is that what happened?

14 **MS. PEACY:** For the 85 emails?

15 **MR. GRAY:** Right.

16 **MS. PEACY:** Yes, we produced them all.

17 **MR. GRAY:** Without regard to whether they were
18 duplicates.

19 **THE COURT:** But you have a record of what you gave
20 to the AUSA. Is that what I understood? You don't know what
21 the AUSA does with them, but you have a record of what you
22 would have turned over to the AUSA?

23 **MS. PEACY:** Yes.

24 **MR. GRAY:** Are you talking about the AUSA or are you
25 talking about the paralegal?

1 **THE COURT:** I couldn't hear you, Mr. Gray.

2 **MS. PEACY:** So we upload them to USAfx and send a
3 note to -- I think between yourself, Mr. Cooch, and then
4 there's been a couple of paralegals, so I don't know what
5 agent.

6 **MR. GRAY:** So what you're saying is for all the
7 stuff that was searched for and produced before the plug was
8 pulled by the defense, you still have copies and records of
9 all of them?

10 **MS. PEACY:** Yes, yes. We have the redacted copies of
11 all of those.

12 **MR. GRAY:** And do you recall the last date that you
13 sent over a production?

14 **MS. PEACY:** I believe it was the 18th or 19th of
15 January was the last item we sent over before trial started.

16 **MR. GRAY:** Are you sure of that?

17 **MS. PEACY:** I couldn't tell you whether it was the
18 18th or 19th, without looking at my notes.

19 **MR. GRAY:** But you believe it was one or the other?

20 **MS. PEACY:** Yes, it was one or the other.

21 **MR. GRAY:** Well, I can tell you that our last
22 production we made to defense was January the 12th. And what I
23 recall being said on the record at the hearing on January the
24 10th or maybe this was in Mr. Cooch's last letter, was that
25 there were about another thousand pages of documents that were

1 ready to be produced. And in addition, there were another
2 thousand pages of documents that were still in the redaction
3 queue. And on January the 12th we produced -- and this is
4 Government-produced production letter number 12, this was two
5 days after the defense said they didn't want anything else,
6 they were ready to go to trial. And that was literally the
7 words Mr. Ahlers said. "We are ready for trial." That
8 included 600 pages of documents relating to Mr. Jonathan
9 Smith, it included 415 pages of records from Ms. Kimmel's own
10 high side emails. It included 52 pages of records from
11 Tiffany Starr-Smith.

12 **THE COURT:** What happened to the documents that were
13 sent over on the 18th or 19th?

14 **MR. GRAY:** I'll have to check about that, Your
15 Honor. I mean, we'll have to determine what was in that. I
16 mean, the discussion that Mr. Cooch and I had was that we
17 would continue producing whatever we received in spite of what
18 the defense had said. But I'm not -- I don't -- I'm not going
19 to say anything when I haven't had a chance to look at it,
20 Your Honor, because I don't want the defense to be able to say
21 that I misrepresented something down the road. But we
22 certainly will look into that to determine if there was
23 anything else that came. I mean, and the issue that
24 fair-minded people have to apply to this was that anything
25 arriving on the 18th or the 19th, I mean --

1 **THE COURT:** We had already picked a jury on the
2 15th.

3 **MR. GRAY:** The 19th.

4 **THE COURT:** The 19th, excuse me.

5 **MR. GRAY:** I think it was Thursday, the 19th. I
6 said this repeatedly in the hearing on the 10th. If we're
7 going to go forward to trial on the 23rd, this has to stop. We
8 cannot continue having our attention distracted by handling
9 these discovery productions, many of which there is no reason,
10 let's emphasize this, there is no reason to believe that there
11 is anything of material significance in these. This is what
12 the defense asked for, but now the defense has withdrawn that
13 request.

14 So to say that right up to the last minute we should be
15 processing those, I mean, Mr. Davis I can tell you, our
16 paralegal, was wild with frustration at trying to get the time
17 to just do the Government's exhibits and get them ready for
18 trial within that short period of time.

19 **THE COURT:** Well, maybe the story is in the fact
20 that I don't think any of these documents ever came in at
21 trial.

22 **MR. GRAY:** There you go. I think one or two of them
23 did. One or two. There were like drafts of the -- the drafts
24 of a couple of evaluations and he got to produce those at
25 trial. They were never finalized -- I think one of them, I

1 think one was finalized, one was not. But yes. I think we'd
2 have to check, but I'm sure it was probably 15,000 some-odd
3 pages of documents that got produced. That's a very rough
4 estimate.

5 **THE COURT:** I was going to actually ask Ms. Peacy
6 that question if she had any ability to quantify for me how
7 many documents you, meaning not you personally, but NSA
8 produced to the Government as a result of my order. There were
9 some already produced actually, of course in discovery by the
10 Government in the first place, but then I issued that order in
11 August.

12 **MR. GRAY:** And Your Honor, if I can clarify this,
13 Ms. Peacy I think did not even come into this until November
14 of 2022.

15 **MS. PEACY:** Yeah, it was late September, early
16 October so I don't have knowledge prior to that.

17 **MR. GRAY:** What we got was reflected by the
18 successive transmission letters. The one I just mentioned was
19 transmission letter number 12. Those went back to right after
20 the arraignment the previous year. But everything that we
21 received from the NSA and produced is reflected in those
22 transmittal letters. And as I say, the very last one reflects
23 a transmission of Tiffany Starr-Smith's records, records from
24 the defendant's emails, records from Mr. Smith. So, I mean, is
25 there anything else we need Ms. Peacy for?

1 **MS. WEEKS:** I'd like to ask her a few questions if I
2 can.

3 **THE COURT:** Sure.

4 **MS. WEEKS:** So just so I'm clear, sorry, I'm a
5 little slow this morning. You're saying here today that there
6 were no documents that had been redacted and reviewed that had
7 not been turned over to either the AUSA or to the defense?

8 **THE COURT:** Or to who, the AUSA or?

9 **MS. WEEKS:** Or to the defense.

10 **MS. PEACY:** Again, we don't turn over to the
11 defense. That's not our process. But everything that we had
12 that had been reviewed and redacted had been turned over to
13 the AUSA.

14 **MS. WEEKS:** And the last production to the AUSA was
15 on the 18th?

16 **MS. PEACY:** I believe it was on the 18th or 19th. I
17 believe if I remember correctly it was one Excel file document
18 that they had trouble redacting. It took an extensive amount
19 of time for that one file.

20 **THE COURT:** So this is the 18th or 19th of January
21 of 2023?

22 **MS. PEACY:** Correct.

23 **THE COURT:** So you're saying if you remember, Ms.
24 Peacy, was that the only part of the production, the Excel
25 spreadsheet?

1 **MS. PEACY:** I think that was the only item sent on
2 the 18th or 19th. There were multiple items exactly as Mr.
3 Gray said, there were multiple items for multiple different
4 custodians that were sent somewhere between the time frame of
5 the 10th and that 18th date. But I think the last item sent
6 over was a singular Excel file that they had trouble
7 redacting. Those are a little harder to redact than say a Word
8 file or PDF document.

9 **MS. WEEKS:** And does NSA maintain a log of the
10 documents that are sent over?

11 **THE COURT:** I'm sorry, Ms. Weeks, because you're
12 facing --

13 **MS. WEEKS:** I'm sorry, Your Honor.

14 **THE COURT:** --facing Ms. Peacy, somehow I'm not
15 hearing you.

16 **MS. WEEKS:** I was just asking if NSA maintains a log
17 of the amount of documents they produce to the AUSA and the
18 dates and the size of the document production.

19 **MS. PEACY:** So we maintained a folder of everything
20 that was transferred over. It's dated. If we opened it up it
21 would tell us the size of those documents. Offhand I couldn't
22 give you a page number, exact page number off the top of my
23 head, but if we went back and looked I could give you a page
24 number in totality.

25 **MS. WEEKS:** Okay, that would be helpful. And then in

1 terms of applying search terms, when Mr. Pyne was here last
2 week I think he said Tiffany Starr-Smith's high side emails
3 had been searched but not her low side emails; is that
4 correct?

5 **MS. PEACY:** Correct. We did not receive -- so the
6 process for them to get all of those emails from archives to
7 reproduce them from that time was still being worked. We did
8 not get those -- I believe it was the 18th of January was when
9 we got the unclassified from our low side system. There might
10 have been Unclassified For Official Use Only in the classified
11 system, those we did search.

12 **MS. WEEKS:** Okay. So NSA now has Tiffany
13 Starr-Smith's low side emails, but they have not applied the
14 search terms to those emails?

15 **MS. PEACY:** Correct.

16 **MS. WEEKS:** And were the documents that were
17 searched both emails and shared drives?

18 **MS. PEACY:** Yeah, they were shared files and emails.

19 **MR. GRAY:** Point of clarification. What time
20 period?

21 **MS. WEEKS:** We're only asking for the 19 months of
22 the indictment period.

23 **MR. GRAY:** What time period in terms of the search
24 being done?

25 **MS. WEEKS:** What do you mean? Like when was the

1 search done? They were saying the search has not been done on
2 Tiffany Starr-Smith's emails at all.

3 **MS. PEACY:** Low side.

4 **MR. GRAY:** Clarification, low side emails. So that
5 was something that was -- there was production of emails from
6 her that was sent over on January the 12, 2023, that
7 presumably was the high side emails --

8 **MS. PEACY:** And her high side files.

9 **MR. GRAY:** And her high side files. The low side
10 files would be the only thing still left. When you say "low
11 side files," those are low side files that contained any of a
12 rather lengthy list of -- and these are not necessarily --
13 these are really I think into the not so much as like -- this
14 is what Ms. Meade told me -- not so much as like literal
15 search terms, but it's topics that would be used to generate
16 ideas. Okay, if you can any of anything else, throw that in
17 too in terms of what you're searching for. That's what she
18 told me.

19 **MS. PEACY:** So we had search terms after August of
20 2022. So the custodians that were listed in that August 2022,
21 we searched those using search terms. Prior to that I believe
22 what you're saying is accurate, they searched topics. I was
23 not involved in those searches because it was before I came on
24 board.

25 **MR. GRAY:** Okay, thanks for that clarification.

1 **MS. WEEKS:** And is there a record of the searches
2 that were run?

3 **MS. PEACY:** Which terms were used against who?

4 **MS. WEEKS:** Yes.

5 **MS. PEACY:** Yes.

6 **MS. WEEKS:** The ones that you're saying were kind of
7 modified by the person conducting the search, those exist,
8 like a record for what was searched for exists?

9 **MR. GRAY:** Let's be clear about this --

10 **THE COURT:** Let her finish and then --

11 **MS. PEACY:** They weren't modified. We were given set
12 search terms after August of 2022 with specific time periods
13 to search against specific custodians. And that's what we
14 used when we did those searches any time after August of 2022.

15 **MS. WEEKS:** And I believe that's the spreadsheet
16 that Mr. Gray has shared with us.

17 **MR. GRAY:** Spreadsheet?

18 **MS. WEEKS:** The spreadsheet attached to your letter.
19 It's right there in front of you, the red.

20 **MS. PEACY:** The one you placed on the screen before.

21 **MR. GRAY:** Yes, those. Right. Okay, anything
22 further?

23 **MS. WEEKS:** So we requested approximately seven
24 additional terms. What is the process like for searching those
25 terms in the database of documents that are collected?

1 **MS. PEACY:** So we would have to -- for each
2 custodian we would upload one month at a time because that's
3 how they're pulled off and then we would search those terms,
4 put the search term in and search the search term against it.
5 If the search terms are fairly narrow or included something
6 like a term "and InfoTeK" "and Ironbridge," that narrows it
7 down a little bit. If there's a broad search term like
8 "badge," that could bring back a lot of things that are
9 unrelated that then we'll have to go through and figure out
10 what's really related to this case and what is -- for example,
11 if someone used the word "badge," say a security person wrote
12 "badge" and what pulls in from that. So depending on how
13 specific the search terms are is the length of time it could
14 take.

15 But we have -- for the custodians listed we have all of
16 their emails and files already, so there won't be any
17 additional time to have those files uploaded. If we add any
18 new folks in, that would be additional time to have those
19 emails reproduced. There are a few folks that when we were
20 given the search terms we were only searching July of 2017 for
21 their search terms. For those folks we only have July of
22 2017. So if we were asked to search outside of that scope we
23 would also have to have those emails recreated for us.

24 **MS. WEEKS:** Do you know who those custodians are?

25 **MS. PEACY:** If I could grab my notes I could tell

1 you for sure.

2 **THE COURT:** Sure. What would be the relevance of
3 searching for the word "badge"?

4 **MS. WEEKS:** Your Honor, our client was responsible
5 for onboarding new hires to the Ironbridge contract and part
6 of that was getting their badges set up. And there was
7 communications about that process, paperwork that had to be --

8 **THE COURT:** What about searching for, I mean,
9 "badge" is so generic.

10 **MS. WEEKS:** Your Honor, I think there's --

11 **THE COURT:** Especially when you have to badge in or
12 the access card system. I mean, that just seems like a wild
13 goose chase.

14 **MS. WEEKS:** I think we can certainly work together
15 to put in some limiting terms to make sure that this is only
16 coming up with either contractors who were onboarding
17 Ironbridge and/or Jacky and, you know, Ironbridge to try to
18 just narrow it so we're not getting all badge-related
19 correspondence for the whole NSOC.

20 **THE COURT:** Ms. Peacy if you know, I know you
21 weren't involved throughout, but to the extent you know, who
22 chose the search terms that were used in the first place?

23 **MS. PEACY:** So while I wasn't involved in that, my
24 understanding was there was some discussion between the
25 prosecution's office and the defense and they came up with

1 those search terms based on that.

2 **THE COURT:** Okay, thank you.

3 **MS. PEACY:** So there are several people that we were
4 given smaller time frames to search. Some of them are also in
5 the time frames that have larger, so we did have larger time
6 frames for some of them. Jennifer Blake and -- Jennifer Blake
7 we had July of 2017 only. Katherine Cruder we only had July of
8 2017 for her as well. Those are the two.

9 **MR. GRAY:** And if I may, what was the significance
10 of July 2017? Do you know why that time period was asked to
11 be searched for?

12 **MS. PEACY:** It was specific to the 2017 management
13 review meeting notes and any emails related to that. The
14 search term was 2017 management review and InfoTeK. It was
15 specifically looking for those PMRs.

16 **MR. GRAY:** Which I think was item four in defense
17 counsel's January the 4th, 2024 letter.

18 **THE COURT:** Did you have --

19 **MS. WEEKS:** Correct. I mean, that is the relevance
20 of July 2017.

21 **THE COURT:** Was Jennifer Blake, am I remembering
22 correctly, one of the people Mr. Ahlers had talked about
23 calling as a witness and then he didn't?

24 **MR. GRAY:** You're impressive, Your Honor. Yeah, that
25 was another little wrangle because she was --

1 **THE COURT:** Overseas or something.

2 **MR. GRAY:** She was now in Germany and we had
3 indicated that we weren't going to call her, but that if he
4 wanted her we would make the arrangements to bring her over
5 and in the end, he decided not to bring her in.

6 **THE COURT:** So that's why her name doesn't really
7 come up much at the trial.

8 **MR. GRAY:** No.

9 **THE COURT:** It came up in that way, I remember that.

10 **MS. WEEKS:** Your Honor, Jennifer Blake was the C O R
11 T, the technical T and our client did have a lot of
12 correspondence with her.

13 **THE COURT:** Right. Mr. Ahlers had contemplated
14 calling her, but then he didn't. I mean --

15 **MS. WEEKS:** Yes. Excuse me, technical director. It
16 is disturbing that only July 2017 of her emails were searched
17 if she was one of the primary points of contact for our
18 client. Just to clarify, you're saying that only July 2017
19 were the only emails and files that were searched for Jennifer
20 Blake?

21 **MS. PEACY:** Correct.

22 **MR. GRAY:** Just to clarify, are you talking
23 originally or recently?

24 **MS. PEACY:** Originally. That was the only thing.
25 So she only appeared one place in the search terms we were

1 given. Her name only appeared as a custodian under those two
2 requests for search term related to the 2017 management
3 reviews. Her name did not appear under any of the other search
4 terms we were given. So only 2017, July 2017 was pulled and
5 recreated for her emails and files.

6 **MR. GRAY:** And once again, just what time period was
7 that pulled during?

8 **MS. PEACY:** That would have been prior to my start
9 through -- some of the files -- some of the folks never even
10 got pulled before trial started. So I would say sometime
11 before August when they decided who the custodians were
12 through when the trial started. There were a couple folks that
13 were minor people that only had one or two search terms, like
14 folks that were also in that same search term category as
15 Jennifer Blake, that their files were still in the process of
16 being uploaded and recreated and were never recreated prior to
17 trial.

18 **MR. GRAY:** Right. And so just so we're clear, this
19 document which I think I attached as an exhibit to I think
20 it's maybe like ECF number 410, a letter about sort of the
21 defense's additional requests. So as to people like the
22 defendant, Kristin Mair, Jonathan Smith, Jason Doyle, Regina
23 Shirley, Tiffany Starr-Smith and Donald Pugh, those are all
24 people that previously were searched for; is that right?

25 **MS. PEACY:** Yes. And we have at least two years, at

1 least 2016 and '17 dated for all of them. Some of them we have
2 even further back, as far back as 2015 for some of those folks
3 that were searched previously.

4 **MR. GRAY:** And as to these folks, new defense
5 counsel is now asking for different search terms than were
6 used in the previous search.

7 **MS. WEEKS:** As discussed at the January 9th
8 conference and as ordered by the Court, yes.

9 **THE COURT:** Well, I'm not sure I really ordered
10 necessarily all the terms you contemplated, but if I did I'm
11 going to revise my order.

12 That said, I need to understand. If you have -- what I
13 thought I heard you say, Ms. Peacy, is if you have these
14 emails already, using new search terms or additional search
15 terms is not going to be necessarily difficult; is that
16 accurate? Did I say that right?

17 **MS. PEACY:** Yes. It's not as labor intensive as
18 having to rebuild those emails and also have those uploaded.
19 So it's just the time and we have to do one month at a time.
20 So depending on the amount of time we are searching will kind
21 of tell us the amount of time it would take us, right? If
22 we're searching one or two months versus 24 months, it would
23 be quicker.

24 **THE COURT:** Okay, so let's take a person -- I just
25 want to be sure I understand what you're saying, that I have

1 this right. If you have Jennifer Blake -- first of all, my
2 question is did you only search July of 2017 because there was
3 -- in the effort to determine if she was someone for whom
4 records should be searched, her name with the terms you used
5 her name only came up in July of '17?

6 **MS. PEACY:** Correct. She was only listed as a
7 custodian against that search term for the 2017 PMR. She was
8 not listed for a ton of the other search terms we were given.

9 **THE COURT:** Okay, so I want to be clear about this.
10 You, NSA, the Government, did not randomly limit Jennifer
11 Blake's search to one month. One month was searched because
12 when you were doing a broader effort, her name appeared only
13 in one month. Did I say that right? Did you understand what I
14 said?

15 **MS. PEACY:** Yes, I understand what you're saying. So
16 when we were given search terms we were given the search term,
17 a time frame, and then we were given which custodians to
18 search within that search term. That was a list that I'm not
19 sure how it was created, but my understanding is it was a
20 conversation between prosecution and defense. So that list of
21 defense search terms is what we used.

22 So in Jennifer Blake's case, her name only appeared as a
23 custodian for that 2017 management review search term. Her
24 name did not appear listed as a custodian for any of the other
25 search terms we were given.

1 **THE COURT:** Okay. So what I'm trying to establish
2 so that the record is clear is the Government, whether it's
3 NSA or the U.S. Attorney's Office, did not unilaterally if you
4 will, decide "We're only going to look at one month for
5 Jennifer Blake." You looked at one month for Jennifer Blake
6 because using the terms that you used, which as I've always
7 understood it was a result of Mr. Ahlers' request, that was
8 how I understood it with input from the Government, her name
9 showed up only for that period. Is that accurate?

10 **MS. PEACY:** That's correct, Your Honor.

11 **THE COURT:** You didn't decide we're not looking at
12 Jennifer Blake, this very important person, for all the other
13 months because you didn't want to look for the rest of the
14 months. You only looked using the terms you had?

15 **MR. GRAY:** Right.

16 **THE COURT:** And her name pops up for that one month.

17 **MS. PEACY:** Yes, ma'am.

18 **THE COURT:** Okay, well that's really important.

19 **MR. GRAY:** Yes.

20 **THE COURT:** To me.

21 **MR. GRAY:** And Your Honor, if I may, if I may add
22 something else about that. Ms. Blake and Ms. McComber were
23 very close personal friends and I've seen lots of emails
24 between the two of them that were just purely friendly emails,
25 friendly discussions. So if the defendant is telling her

1 counsel that Ms. Blake was one of her principal contacts, a
2 lot of that was social. And that's why the point that was just
3 made using the search terms the only time she comes up is in
4 July of '17 in association with the PMR, that's very
5 significant.

6 **THE COURT:** And Ms. Peacy, did I understand you
7 correctly that to broaden the search now is not problematic if
8 it's for the same periods of time? What would be difficult
9 even though -- I'm only just -- I'm sorry if I'm muddling too
10 many things in one sentence. If a person's period of time was
11 multiple months, it would be labor intensive for NSA because
12 you have to do it one month at a time. But it wouldn't be the
13 same intensity as if you have to go find new months
14 altogether. Did I understand that correctly?

15 **MS. PEACY:** Yes, ma'am. That's accurate.

16 **THE COURT:** So if I said to you, "I want you to go
17 back and search Jennifer Blake beginning in March of 2016,"
18 that would be a big ask because you don't have those uploaded
19 anywhere; is that right?

20 **MS. PEACY:** Correct. Capabilities would have to get
21 those from archives and re-upload which would take some amount
22 of time on their part before we could even begin searching.

23 **THE COURT:** And the uploading process, just to find
24 them I think we should be clear what exactly is involved in
25 that.

1 **MS. PEACY:** So I unfortunately cannot speak to that.
2 The capabilities folks at NSA do the uploading and recreation
3 of that email. What I can tell you is that when they were
4 producing for the custodians we were given previously and the
5 parameters we had, that started sometime before August and was
6 still being done even when trial started and we didn't have
7 all of them.

8 **THE COURT:** And I'm not -- I know there's more
9 questions of you, but just when you're done, is there anyone
10 here with you from NSA who can answer my questions, or for the
11 record explain what the process entails to locate records,
12 emails if you will, whatever it might be, documents outside
13 the period where we already have the documents?

14 **MS. PEACY:** No, ma'am. We didn't bring anybody
15 today because we thought we were talking about the principals
16 listed in the proposal who we do have emails for.

17 **THE COURT:** Okay, but the time periods are not
18 necessarily what defense has wanted, so that's why I was
19 asking that question.

20 For the people for whom there are multiple months,
21 conducting a search with new terms other than the time -- and
22 I don't mean to minimize it -- that it would take because you
23 have to go month by month, once that's done, do you have any
24 sense of how much time we're talking about?

25 **MS. PEACY:** So Mr. Keefe could speak better to that

1 than I could because once we have all of them, we turn them
2 over to his office that does the redaction and they do the
3 redaction from there. That's their process.

4 **THE COURT:** Okay. So this all would be basically the
5 first step in a multi-step process for the NSA. It hardly
6 tells the story to get them uploaded. It's after that once
7 you identify them, then you have to go -- and I say "you,"
8 meaning NSA has an intensive redaction process. Is that right,
9 from your knowledge?

10 **MS. PEACY:** Yes, ma'am.

11 **MR. GRAY:** Classification review and redaction. So
12 the second step is a two-step process too.

13 **THE COURT:** And did counsel say that correctly?

14 **MS. PEACY:** Yes, that's correct.

15 **THE COURT:** Okay. Adding new people altogether would
16 be similar to adding I gather time periods that weren't
17 previously searched; is that true?

18 **MS. PEACY:** Yes.

19 **THE COURT:** It would be the same idea. I mean,
20 basically you've got to find where -- their materials are --
21 if you can answer this, I mean, just so again the record is
22 clear, some of this has been covered in other hearings, but
23 how are they maintained such that NSA could go back in time
24 and find them in the first place?

25 **MS. PEACY:** So I can only offer a very high level

1 because my understanding, I'm not technical in nature, that's
2 not my understanding, by they are archived off after a year.
3 So we're talking periods that have been archived for years.
4 And they pull those archives one month at a time. So they
5 would have to pull the archive records each month and upload
6 those each month at a time to recreate those documents.

7 **THE COURT:** Okay. Anybody want to ask anything in
8 light of my questions?

9 **MS. WEEKS:** I just had one clarifying point, Your
10 Honor. I heard a little bit of a distinction between how you
11 were describing the Jennifer Blake search parameters and how
12 Ms. Peacy was. My understanding is that the search was limited
13 to July of 2017 because of the agreed upon search parameters
14 by counsel, right? Not because they conducted some search and
15 her name was only popping up in terms of having documents for
16 July 2017.

17 **MS. PEACY:** Correct. The parameters for Ms. Blake
18 we were given were only one month, July 2017.

19 **THE COURT:** See now then I'm lost because I thought
20 that's not what you said. I thought a preliminary search was
21 conducted and her name only appeared for July of 2017.

22 **MS. PEACY:** No. We were only given her name for a
23 one-month parameter under search term for July 2017 under that
24 2017 program review search term.

25 **THE COURT:** So in other words, there was no effort

1 to search her files I'll call them, whether it's high side
2 emails, whatever it might be, none of that was done for any
3 month beyond July '17 -- first let me stop there; is that
4 correct?

5 **MS. PEACY:** So my knowledge, once I came on board in
6 September or October of '22 that would be accurate. I'm not
7 sure and I can't speak to what might have been done before
8 that.

9 **THE COURT:** So do you know how it was determined to
10 only look for her for one month?

11 **MS. PEACY:** I don't. I was not involved in that
12 process. That happened before I came on board.

13 **THE COURT:** Okay, thank you. Anybody else have any
14 questions?

15 **MR. GRAY:** I don't have any further ones for Ms.
16 Peacy, Your Honor. But there are other matters I still need to
17 address.

18 **THE COURT:** Thank you, Ms. Peacy. See now I don't
19 really get it, Mr. Gray. Maybe you can help me out here. Why
20 was Jennifer Blake only searched for one month, just out of
21 curiosity? Not saying she should have been searched for more,
22 but why only one month? Who made that decision?

23 **MR. GRAY:** Your Honor, this explains why we have to
24 do the document that I began referencing about a month ago.
25 We need to do a complete explanation of the course of the

1 searches, what decisions were made, who did it, who made those
2 decisions and we have to have that to be ultimately part of
3 the appellate record in this case. I mean, I think Your Honor
4 has gotten a sense now as to why reopening all of this now and
5 ignoring the defendant's waiver is such a problem.

6 And I want to go back to this document from the defense.
7 And I think this -- I'm sorry, can we get this up on the
8 screen?

9 **THE CLERK:** You have to change it to document cam on
10 the little box over there. It's a little screen on the side.

11 **MR. GRAY:** Okay, document cam. Yes.

12 **THE CLERK:** There you go.

13 **MR. GRAY:** So this is what I received from Ms. Peacy
14 and there's two things I want to point out about this.

15 **THE COURT:** Is this already -- is this part of your
16 ECF 411?

17 **MR. GRAY:** I'm thinking that it was attached as an
18 exhibit, like Exhibit 1 or 2 to ECF 410, but my memory of that
19 may be off, but it was --

20 **THE COURT:** I just wanted to make sure we have a
21 good record.

22 **MR. GRAY:** You'll see at the bottom there are three
23 people who were labeled who I think Ms. Weeks was under the
24 perception were not previously searched for at all. I mean, I
25 can't believe Mr. Bryant was not searched for. I'm quite

1 confident that searches were run on Mr. Bryant's documents. We
2 can confirm that, but the idea that we wouldn't have searched
3 that given that he was one of our most important witnesses and
4 the defense would not have requested Mr. Bryant just it makes
5 no sense to me.

6 Now the next two names above that, Megan Collins and
7 Sherrill Guinther, quite bluntly the idea that we're being
8 asked to conduct searches of their records using all of these
9 terms is mind boggling because Ms. Guinther was out of
10 supervising the Ironbridge contract in I believe February of
11 2013, so more than three years before the period that's
12 covered from the defendant being a program manager. She had a
13 role at trial as Your Honor will recall because of the
14 dealings she had during that early period in 2011 through the
15 very end of 2012, beginning of 2013.

16 Megan Collins was a contract specialist under Ms.
17 Guinther, I believe in the time period just of 2012. She had
18 not worked for the NSA for years after that. But she also had
19 some involvement in connection with -- I think she was the one
20 who actually transmitted the facts -- well, whose name was put
21 on the facts that supposedly transmitted the Guinther letter.
22 That's how she got dragged into the case.

23 **THE COURT:** But you're saying based on the time
24 period they couldn't be relevant to the lawsuit.

25 **MR. GRAY:** Correct.

1 **THE COURT:** And Ms. Richman is shaking her head in
2 the affirmative. Does that mean you agree?

3 **MS. RICHMAN:** Yes, Your Honor. And this is
4 illustrating to me how useful it would have been to get on the
5 phone and talk this through with Mr. Gray after we sent the
6 search terms to him.

7 **THE COURT:** Okay, but how about Rob Bryant?

8 **MR. GRAY:** As I say, Your Honor, we can check on
9 that, but--

10 **MS. PEACY:** I think there was a second page to that.

11 **MR. GRAY:** Am I missing a second page? There it is,
12 right. It's just carried over onto the second page where it
13 reflects what was previously searched for him. And then Erica
14 Heinze where they're adding a whole number of things in
15 connection with Erica Heinze that came in the last period and
16 then Jennifer Blake.

17 **MS. WEEKS:** Just to clarify, Rob Bryant only had the
18 2017 management review, project manager or PM and removed her
19 bill for hours. What you showed on page 2 was the search for
20 Jason Clark. And all we're asking is that Rob Bryant had the
21 same search terms already searched for the other custodians
22 related to the request.

23 **MR. GRAY:** I see. It's a little confusing, Your
24 Honor, because the name of the person in question appears like
25 on the very last line of the paragraph that supposedly

1 indicates everything that was searched for. So it's a little
2 baffling. And then I guess as to Jennifer Blake it's just
3 those few items. They themselves appears only are asking for a
4 few items related to the program manager review.

5 **THE COURT:** But I can't tell. Are you saying Rob
6 Bryant there was a search or there wasn't a search?

7 **MR. GRAY:** Your Honor, what I'm saying is -- and
8 remember, once again I had to deal with everything else that
9 Mr. Ahlers was generating, plus be lead counsel on the trial
10 in terms of preparing the case for trial. So Mr. Cooch was
11 the one who took on the lead role. And quite frankly, for
12 most of the time period from the end of September, October,
13 November, December of 2022, most of his time was spent on
14 dealing with these document production issues rather than
15 preparing for trial per se.

16 **THE COURT:** Well, it's a simple question. Can
17 someone from NSA answer my question?

18 **MR. GRAY:** Of course.

19 **THE COURT:** Was Rob Bryant someone who was searched?

20 **MR. GRAY:** Absolutely. That was assumed by my prior
21 statements, Your Honor.

22 **THE COURT:** Well, whatever you just showed me which
23 isn't going to be clear on the record because we don't have a
24 reference point for it, doesn't make it clear what the search
25 was for him.

1 **MR. GRAY:** Yes, Your Honor. This document was an
2 attachment to one of my letters under ECF 410 or ECF 411.

3 **THE COURT:** It's one of your letters --

4 **MR. GRAY:** And there was one other thing that I
5 wanted to cover here. This is more sort of correcting the
6 record from something that happened back during the sentencing
7 hearings in November. During the sentencing hearings in
8 November, as part of the discussion of the Guinther letter, I
9 produced Access Control -- it may have been just in an email
10 confirming that Ms. Guinther was in Access Control on both
11 December the 19th of 2021 which was the date of the letter
12 from which Ms. Guinther's signature was cut and pasted on the
13 later fraudulent Guinther document from October the 10th of
14 2012. So I produced documents showing that she was in Access
15 Control on both of those dates so there could not be a
16 suggestion that "Oh, well she was out of the office so perhaps
17 she had someone else do it for her."

18 Ms. Weeks objected strenuously that that document had
19 never been received in discovery previously and as this
20 reflects, they got those Access Control records on December
21 the 20, 2022 in advance of the original trial. So I think we
22 just need to correct that in terms of the record of the
23 sentencing proceedings back in November.

24 Your Honor, let me see what else I may have. And Your
25 Honor, just one other thing I want to make a cautionary note

1 about is the idea that sentencing determinations are
2 completely different from guilt/innocence determinations,
3 especially in regard to cases involving the submission of
4 false claims where the amount of the loss is at issue. As
5 I've said, I don't believe there's a basis for that. It's not
6 a distinction that we apply in terms of our discovery
7 productions in this case. It's not the kind of distinction
8 that's applied in the U.S. Attorney's Office in discovery
9 productions in any case. But accepting that at face value
10 would mean that in virtually any criminal case in this
11 district, the defense can then come back after the trial phase
12 and say, "Okay, now we want all of these additional discovery
13 requests in connection with the sentencing phase because the
14 sentencing phase presents completely different issues."

15 **THE COURT:** The sentencing phase what?

16 **MR. GRAY:** Presents different issues. That would be
17 a very ominous and unfortunate precedent to set. And there was
18 an example of something that I thought legitimately fell into
19 that category which was when they raised the question that
20 they thought there was positive information about her
21 character in the security file, that was something that had
22 not been part of our guilt/innocence case at trial. Would not
23 have been relevant because we would have been getting into
24 issues of her character which would not have been appropriate
25 at trial. But when they raised that once we figured out what

1 they were actually talking about that it was not the personnel
2 file, I went out to the NSA as early as September the 30th to
3 review those records and to start those in the process of
4 being reviewed.

5 So occasionally there will be things where there may be
6 some issues that goes to a defendant's character that would
7 not be properly within the scope of guilt/innocence
8 determinations. But to say that any case where the defense
9 can just say "Oh, well, the amount of the loss is not quite --
10 is not the same as what is material for the purpose of the
11 elements of the Section 287 violation so we're entitled to go
12 back to the races on discovery and start something entirely
13 new there absent some really substantial reason for believing
14 that something significant was not turned over originally and
15 should be produced now."

16 And in this case we have the -- and I'm sure this is
17 unprecedented in the federal reports, where a defendant has
18 and her counsel, knowingly waived further production of items
19 that they have demanded, probably because they knew they were
20 not very useful since of the thousands of pages previously
21 produced they only used one or two of them. Would they have
22 waived that? And the Government has shut down its processes,
23 when a thousand pages were apparently still in the security
24 and classification department's queue at that time and
25 presumably were getting close to being produced. When we were

1 being told that the remaining thousand pages could probably be
2 produced and reviewed and redacted and reduced within at most,
3 four to six weeks. We shut all that down, the request of the
4 defendant and her counsel and have been substantially
5 prejudiced as a result of having done so.

6 I mean, Ms. Richman was raising issues about the
7 defendant having been prejudiced by the continuing ongoing
8 character of these proceedings which is wholly a function of
9 the defendant's own demands.

10 And Your Honor, I want to emphasize the Government has
11 been severely prejudiced by the continuation of all of this,
12 from this engineered change of counsel back in May of last
13 year to the present. The NSA has been severely prejudiced by
14 the continuation of this and was prejudiced by the frivolous,
15 groundless, unproductive request that they were forced to deal
16 with for months in advance of the original trial. The
17 Department of Justice has been prejudiced by this insofar as I
18 have other matters that I have not been able to address. I
19 have at least one case that I had to decline because of the
20 extraordinary demands that this case and the discovery and
21 everything else put on us.

22 And then finally, obviously the Court by the additional
23 time it's had to take and then finally, perceptions of the
24 justice system as a whole suffer and are damaged when a
25 defendant gets convicted of serious crimes like this on

1 February the 15, 2023 and has not yet been sentenced almost a
2 year later. There is a lot of prejudice going around in this
3 case as a result of the continuing actions of the defense and
4 their belief that this is what they need to do in order to
5 feel comfortable that they've done their due diligence.

6 **THE COURT:** Well, last hearing they didn't want to
7 postpone the sentencing of March 7 and you did. It's still the
8 sentencing date.

9 So now I appreciate your impassioned remarks, Mr. Gray,
10 and the record won't reflect the passion with which you
11 delivered them so I'm announcing that. I had nothing to do
12 with the change of counsel and I can't help that. That ship
13 sailed, so here we are.

14 **MR. GRAY:** Actually, Your Honor, it hasn't entirely
15 sailed because we intend to bring it up in the sentencing
16 memo. We believe the defendant engineered that.

17 **THE COURT:** Well, the decision to allow the change
18 of counsel is not something that I was involved in.

19 **MR. GRAY:** Exactly, yeah. And as a matter of fact,
20 I think we're probably going to be requesting that the
21 attorney inquiry hearing be transcribed because I would not be
22 at all -- we have some reason to believe as the defense would
23 say, that it's reasonably likely that false representations
24 were made at the attorney inquiry hearing.

25 **MS. RICHMAN:** Your Honor, to the extent that hearing

1 was ex parte, I think an inquiry will need to be made about
2 whether the Government is entitled to that. If they're
3 pursuing a new investigation of facts with connection to --

4 **THE COURT:** Well, I don't want to spend a lot of
5 time on it because this would be --

6 **MS. RICHMAN:** I don't either, Your Honor, but I
7 would object to an ex parte--

8 **THE COURT:** Talk about a frolic and a detour. I
9 don't think that would be a productive use of our time.

10 **MR. GRAY:** I think Your Honor would have a very
11 different view when you see what the defendant was actually up
12 to at the time of that transfer.

13 **MS. RICHMAN:** I understand that Mr. Gray is
14 referring to communications my client and her counsel made to
15 policymakers noting their disagreement with interpretation of
16 the law. I spent a year on the Health Hill working for
17 Senator Durbin. It was fairly routine for me to see people who
18 were not happy with the positions courts had taken come in and
19 request changes to the law or changes in policy as a result of
20 that.

21 I'm interested in why Mr. Gray thinks that this is an
22 engineered -- I don't -- I think it probably is a sideshow to
23 the issue of sentencing, but if there is discussion of ex
24 parte transcript of an attorney inquiry hearing being made
25 available to the Government, we will want to brief that and

1 understand the basis for that request. That is all I'd like to
2 say.

3 **MR. GRAY:** Of course. That was totally assumed --

4 **THE COURT:** I'm moving off that topic because we've
5 already been at this two hours and I'm not really going to
6 spend the rest of the time that we have on that issue.

7 What I do still feel uncertain about is some of the
8 requests of the defense it would seem to me were already
9 provided in connection with what you say, Mr. Gray, if I've
10 understood your remarks correctly, essentially that as part of
11 your discovery disclosure obligation, some of this material
12 would have -- you weren't sort of parsing out the issue of
13 amount of loss from other issues. So this would have been --
14 some of this it seems to me would have been captured in
15 earlier discovery productions.

16 **MR. GRAY:** From my perspective, Your Honor, prior to
17 trial those were completely indistinguishable. Because
18 anything that showed she spent any time at all --

19 **THE COURT:** But what I searched for an answer for
20 and I don't know that I feel I have one is, for example, are
21 you able to -- I know you weren't involved personally, Mr.
22 Cooch handled this, or Ms. McDonald before. It was sort of
23 never your particular assignment. Ms. McDonald, Joyce
24 McDonald is the AUSA to whom I'm referring who is no longer in
25 the office. But my question would be this claim, for example,

1 that the contract required weekly status reports. So where
2 are they? I mean, did they exist or don't they exist?

3 **MR. GRAY:** I'm sorry, Your Honor. There really were
4 -- I got a little off-track and there really were a number of
5 other points that I had intended to address. We have been
6 going on for a while, so --

7 **THE COURT:** And let me just ask because I never need
8 a break. Does anybody in front of me need a break? You're
9 good? Okay. You'll let me know? Okay, thank you.

10 **MR. GRAY:** As regards to those status reports, and
11 once again, this is -- I mean, it's a substantial record. I've
12 certainly seen far more substantial records and have worked
13 with some fairly recently. But there are times when there
14 appear to be some gaps in defense counsel's knowledge which is
15 understandable under the circumstances perhaps.

16 With regard to the status reports, yes. The ultimate
17 contract includes a number of different items that are set
18 forth as contract data sequels, contract data required
19 documents. I'm confident, I'm pretty sure it may have been
20 testified to by Mr. Bryant, perhaps by Mr. Smith that at trial
21 it was specifically discussed -- I think we went down a list
22 of those reports and I think it was identified that there was
23 maybe only one item that as a practical matter was being
24 insisted upon by the Government in connection with the
25 Ironbridge contract.

1 I mean, obviously these form contracts are used in all
2 sorts of circumstances used widely across the board and so
3 those are standard requirements that are set forth, but that
4 doesn't mean that as a practical matter they actually happen.

5 And it was interesting that the defense said well, Mr.
6 Smith said if you never formally said that he wanted -- he
7 didn't want the status reports anymore. Well, what he
8 actually said was he didn't recall that he ever specifically
9 said no more status reports, he just said, "I remember getting
10 them but I never looked at them. They were of no relevance to
11 me."

12 And quite frankly, Your Honor, as I have sort of viewed a
13 lot of this, I've begun to wonder whether what Mr. Smith
14 called a "status report" was, in fact, the FMHER which
15 basically indicated like how many hours had been expended for
16 every labor category on the Ironbridge contract. And that was
17 important because you had to keep track of that stuff on an
18 ongoing basis to determine whether there was likely to be some
19 kind of a shortage of funds before the end of the fiscal year.
20 That was Mr. Pugh's primary responsibility, it was not Mr.
21 Smith's.

22 All of the FMHERs for the relevant months were introduced
23 in evidence at trial already. So if that was what Mr. Smith
24 was actually talking about, those are already in evidence at
25 trial.

1 I have identified I think in my recent filing that there
2 was testimony by Ms. Colston at trial that she remembered
3 doing her reports, but she was blithe in dismissing how little
4 time they took. And it may well be that at some point after
5 that it just was decided that there really is no need to do
6 these status reports, where all except Ms. McComber who is
7 rarely there, are all in this very small office at NSOC seeing
8 each other on a daily basis basically able to reach out and
9 touch some of her colleagues at the adjoining desk or work
10 station.

11 And so the mere fact that something is in a contract in
12 practical terms doesn't mean that it was done. And the idea
13 that if these were being done during her tenure as the program
14 manager the second time around -- I mean, the most significant
15 statement on this issue is a contemporaneous statement by the
16 defendant herself in that email to Jason Doyle in early April
17 saying Jon Smith told us we don't have to do these anymore.
18 So maybe Mr. Smith doesn't recall having said that and maybe
19 he was just so indifferent to them that at some point people
20 stopped doing them and he never objected. But it is the
21 defendant herself who says that "Jon Smith told us we don't
22 have to do those anymore and so we stopped" and, you know, "I
23 hate having to do these again."

24 And moreover, as I pointed out in my most recent filing,
25 Jon Smith had been gone by that point for like six months. So

1 it's not just that nothing had been done for the previous six
2 months, it's apparently for some time before that during his
3 tenure, prior to his departure in roughly October or November
4 of 2016 they weren't being done either. And that takes us back
5 very close to the time where the defendant became the program
6 manager. So that would suggest that at most, maybe they were
7 being done for a few months in 2016 after she first came
8 aboard before that practice just fell into desuetude as one
9 might say.

10 Let me see if there was anything else. There was some
11 point you had raised which was about --

12 **THE COURT:** I was just wondering if apart from what
13 happened after the Court's order of August 2022, did NSA also
14 have a record of what it produced to the Government prior to
15 that period? Because what lingers in my mind is I haven't
16 felt that I can conclude that a search for these -- I know
17 your point that they were not produced, but who is going to
18 verify that they were -- there weren't any others?

19 **MR. GRAY:** I'm sorry, any other what?

20 **THE COURT:** Status reports or whatever they're
21 consisting of. The fact is that I realize and I understand
22 that you're saying these are form contracts, standard
23 requirements are not enforced and so on. But as a practical
24 matter, nobody really was asking for those particular reports
25 at that point in time. But can someone tell me that search

1 was undertaken? Because you want to distinguish -- well, I'll
2 just add this: I appreciate your point, Mr. Gray. I understand
3 your argument about waiver and/or abandonment, but I don't
4 think it extends to the sentencing. I don't know that this is
5 an everyday occurrence, but there are certainly cases where
6 the courts hold hearings in connection with issues that are
7 solely related to issues pertaining to sentencing. And there's
8 often discovery exchanged in connection with whatever those
9 issues are. So I don't think it's as sort of cut and dry as
10 you want me to conclude. I don't think that whatever
11 transpired before necessarily precludes the defense from
12 seeking to obtain information pertinent to issues that are
13 solely related. I know you're saying they're not solely, but I
14 think this is a much more refined, if you will, aspect of the
15 case regarding issues that are pertinent to sentencing. What
16 is the precise amount of the loss. And it doesn't have to be
17 precise in the sense of what I reviewed when we began, but
18 some kind of -- precise in the sense that we have a range, a
19 reasonable estimation that the Court can base it on.

20 **MR. GRAY:** Your Honor, you have said repeatedly and
21 I cited some of those references in my filing of early
22 yesterday morning that we're not going to do a do-over here.

23 **THE COURT:** And I couldn't be more --

24 **MR. GRAY:** All of these names --

25 **THE COURT:** --positive about that view.

1 **MR. GRAY:** --up there, that is exactly what the
2 defense is asking for.

3 **THE COURT:** Well, for example, right now I'm feeling
4 -- I was trying to go through the transcript of January 9
5 which is ECF 406, and I know with respect to Rob Bryant, it
6 does seem surprising that -- I'm not sure I can say a search
7 was ever done for Rob Bryant. How would that be?

8 **MR. GRAY:** I wouldn't necessarily expect you -- Your
9 Honor, you should not be expected to be able to off the top of
10 your head to say that a search was done for Rob Bryant. I
11 will make this statement: I would be flabbergasted if no
12 search was done for Rob Bryant.

13 **THE COURT:** Could Ms. Peacy tell us?

14 **MR. GRAY:** He was considered an important --

15 **THE COURT:** Right, I agree with you.

16 **MR. GRAY:** He probably would have been one of the
17 very first ones that was done before Ms. Peacy even came into
18 the process in the fall of 2022.

19 **THE COURT:** So on Page 53 of ECF 406, Ms. Peacy
20 says, "Rob Bryant, the only email we found was already sent
21 under Kristin Mair. They were both on the same email so that
22 was sent in the January 2023 time frame." What I think you're
23 telling me is before August of 2023, that information would
24 have been procured regarding Rob Bryant, but I'm not sure that
25 anyone has ever verified that. And is that something you can

1 verify?

2 **MR. GRAY:** Your Honor, you said -- just for the
3 record, you said August of 2023. I think you meant August of
4 2022.

5 **THE COURT:** I'm sorry.

6 **MR. GRAY:** Right. And absolutely, yes, we can
7 verify that. We can, and we will and I hope --

8 **THE COURT:** I did mean my August 2022 order, sorry.

9 **MR. GRAY:** Right, but the fact as to all of these
10 people they're going back and saying "Hey, we now think there
11 are actually other terms that should have been requested for
12 these folks." So even though --

13 **THE COURT:** Well, the terms don't -- maybe this is
14 incorrect, but the terms aren't my worry as much as who and
15 what periods of time. The question for me is whether I'm
16 expanding the number of people and the time period. Because
17 what I think I've heard today and last time is that for
18 someone for whom there's already been an upload, adding a few
19 additional search terms is not going to be as difficult as
20 completely locating and going back to wherever these are
21 stored and finding the people and finding the time periods and
22 uploading those and conducting some -- the process that's
23 involved to do all of it. So I'm not as worried about adding
24 the few search terms as I am what period of time and for whom.

25 **MR. GRAY:** And then beyond that, how long is it

1 going to take those to go through classification review and
2 then the redaction of the names? There is a queue and Your
3 Honor has suggested at times you think that matters in this
4 case should be elevated to importance beyond anything else
5 that is pending with classification review. And at the same
6 time, Your Honor, you yourself have used the word "tangential"
7 to characterize what you believe to be the likely relevance of
8 all of the new stuff that they're asking for. So to ask the
9 NSA to elevate to the top of its priority for classification
10 review the marginal, tangential --

11 **THE COURT:** Well, that's because I don't want to
12 postpone the sentencing, so time is of the essence.

13 **MR. GRAY:** Well, Your Honor, I don't think the NSA
14 should be asked to do that when this is a function of two
15 defense counsel who are hardworking and very zealous and very
16 diligent and who have been trained in the ways of large law
17 firms where the idea is leave no stone unturned, but we're
18 past conviction now. Tons of evidence has been presented. Tons
19 of testimony has been taken and we -- there's a very wise
20 American folk saying to the extent of "When you find that
21 you've dug yourself into a hole, stop digging." I think that
22 time has long since arrived in this case at this point. I
23 think we should be enforcing the waiver that the defendant did
24 back in January of 2010 and getting this thing to sentencing
25 and getting it done. Thank you.

1 **THE COURT:** So let me see if I can wrap this up. The
2 emails, am I correct, that issue, have they actually been
3 turned over or about to be turned over?

4 **MR. GRAY:** They had been turned over to us, Your
5 Honor, and we'll have to number those. I think I also asked
6 my paralegal if she could get them in chronological order
7 because they're not in chronological order, but I anticipate
8 we'll be able to get that done this week.

9 **THE COURT:** So the emails which were a part of the
10 topic are going to be provided, the reduced number this week?

11 **MR. GRAY:** Right.

12 **THE COURT:** For status reports. I had wanted NSA to
13 -- my concern is some of this may have already been done. This
14 is one of the lingering issues I've raised repeatedly that the
15 request was for status reports that related to the duties and
16 responsibilities of the program manager on the Ironbridge
17 contract. And I had contemplated permitting that if it hadn't
18 already been provided.

19 **MR. GRAY:** Your Honor, the contract itself shows
20 what was originally back in 2011 as a matter of standard
21 Government practice set forth as the required reports. We've
22 had testimony at trial from all sorts of witnesses who were in
23 a position to discuss this about what actually was required
24 during Ms. Colston's time and what was not required it appears
25 during most, if not all, of Ms. McComber's time as the program

1 manager.

2 Of course this is something that the idea that the status
3 reports which as we've seen were the subject of -- I mean,
4 those were sent, the last one, the one that we know was done
5 in April of 2017 was sent on the low side from InfoTeK --
6 through InfoTeK's own emails to the Government. The defendant
7 knew she was under investigation, knew what the issues were in
8 this case in October of 2017 like right at -- I mean, that
9 terminated her conduct, the discovery of her fraud as a result
10 of the whistleblower letter that was sent in by the number 2
11 person in her company, the Chief Operations Officer, Shilo
12 Weir.

13 So the idea that the defendant who had counsel then, who
14 had secured counsel in a matter of months in the person of Jan
15 Miller, formally the section chief for our offices' Southern
16 Division and later the U.S. Attorney in the Central District
17 of Illinois that he wouldn't have, like, instructed her to
18 preserve this stuff, that this stuff couldn't have been
19 preserved? That the idea that she -- a) she can't produce it
20 herself. Beyond that I'll have to check the testimony exactly,
21 but I'm not sure she was even asked by her own counsel at
22 trial whether she produced status reports. I'll have to check
23 the record on that, but it wouldn't surprise me if the answer
24 is she wasn't even asked that.

25 **THE COURT:** But here's my question --

1 **MR. GRAY:** She always said -- remember this, Your
2 Honor. She always said, "My main function is the care and the
3 feeding of the personnel on the contract."

4 **THE COURT:** I don't think she said that was her main
5 function, but she said it was something she did.

6 **MR. GRAY:** Oh, if you look at the testimony I think
7 you will find she frequently --

8 **THE COURT:** She certainly said "care and feeding,"
9 but she didn't necessarily say it was her main function.

10 **MR. GRAY:** We will pin that down, Your Honor, but I
11 think in her original NSA transcript she did.

12 **THE COURT:** I read that transcript.

13 **MR. GRAY:** Right.

14 **THE COURT:** Just the other day.

15 **MR. GRAY:** Yeah. I think -- well, we'll check. We'll
16 confirm. But no, I don't recall her ever saying "my principal
17 function was writing reports. That's most of what my time was
18 spent on." Do you recall that, Your Honor?

19 **THE COURT:** No, I do not. But I don't know if it's
20 clear one way or the other if Rule 16 does apply. It does
21 include items obtained from or belonging to the defendant. So
22 the answer that she might have kept them or had them isn't
23 really necessarily dispositive.

24 What I don't want to have happen is that we redo what the
25 Government has done. And nobody has ever been able to tell me

1 what has been looked for in terms of these status reports.

2 Maybe Mr. Pyne can enlighten me.

3 **MR. PYNE:** Ms. Peacy does have a list of exactly the
4 terms and who she's run them against if it would be helpful.

5 **THE COURT:** Okay. Does it include status reports?

6 **MR. PYNE:** Status reports was run against at least
7 six or seven different names.

8 **THE COURT:** Okay, let's find out who then.

9 **MR. PYNE:** And she has all the other terms that were
10 run as well.

11 **THE COURT:** Okay.

12 **MS. PEACY:** For the period of 2016 and 2017 the word
13 "status report," initials "MSR" standing for monthly status
14 report and "InfoTeK" and/or "Ironbridge" associated with those
15 was run against Jason Clark --

16 **THE COURT:** Hang on, I'm writing this down so just a
17 little slower.

18 **MS. PEACY:** Jacky McComber, the defendant; Kristin
19 Mair, Donn Pugh, Regina Shirley, and Jonathan Smith.

20 **THE COURT:** And not Rob Bryant?

21 **MS. PEACY:** He was not listed in the custodians we
22 were given during the search.

23 **MR. GRAY:** But during the search when you were
24 there, right?

25 **MS. PEACY:** Correct. This is from August 2022. I

1 couldn't speak to anything that was done on Rob Bryant prior
2 to me.

3 **MR. GRAY:** Right. Because that would have been done
4 by Maxine Meade, right?

5 **MS. PEACY:** Maxine or potentially someone prior to
6 Maxine, yes.

7 **MR. GRAY:** Right.

8 **THE COURT:** But we don't know because you don't have
9 that information.

10 **MS. PEACY:** I don't have knowledge standing here
11 offhand, but it's something we can go back and find out and
12 talk to some of the other folks that were involved.

13 **MR. GRAY:** And Your Honor, bear in mind that we have
14 testimony from Rob Bryant both in his NSA transcript and at
15 trial that he had no idea what the defendant did as the
16 program manager on the Ironbridge contract.

17 **THE COURT:** Okay. Well let me turn to the defense
18 and ask of the search -- well, the search was done for the
19 words "status report," "InfoTeK," "MSR" -- "MSR" and
20 "Ironbridge." Monthly status report with "InfoTeK" and
21 "Ironbridge" and "status report" for multiple people. So why
22 would I have ordered any more?

23 **MS. WEEKS:** Your Honor, the people listed do not
24 include Roy Bryant as we just discussed. We're not sure what
25 search terms and when were applied to him. But also there's a

1 possibility that the name "status report" would not turn up
2 what we were looking for in that specific form I discussed
3 earlier. That's why we provided one additional search term
4 designed to look for that document that was required by the
5 contract and was not --

6 **THE COURT:** And what's that term?

7 **MS. WEEKS:** That's the DI -- I had it up on the
8 screen earlier.

9 **THE COURT:** I remember, but I don't remember what it
10 was.

11 **MS. WEEKS:** DI_MGMT-803688. That specific form is a
12 requirement under the CDRL. Mr. Stein testified that if the
13 Government was not receiving that for any reason, there should
14 be a noted deficiency in the file and there wasn't. I believe
15 Kelly Sulewski testified that there were monthly status
16 reports required to be done. And again, I would just note for
17 the record that this is distinct from the technical status
18 report that Jason Doyle testified about that Mr. Gray
19 continues to point out.

20 **MR. GRAY:** Let me clarify if we can. You said this
21 is different from the technical status report. And I'm sorry,
22 this is the DI -- that's a DI_management, MGMT-80368 A?

23 **MS. WEEKS:** Yeah, it's AO13 in the CDRL of the
24 contract, if you need further clarification.

25 **THE COURT:** And what exactly do you think that

1 report includes? What's your understanding?

2 **MS. WEEKS:** I looked it up on the internet earlier
3 because again, I've never seen one since it wasn't produced.
4 And I have a list of what it would include if it would be
5 helpful for me to show the Court.

6 **MR. GRAY:** Sure.

7 **THE COURT:** Yes.

8 **MS. WEEKS:** If I can find it. Again, this is the
9 document we're talking about. Status report. The status report
10 documents the status of contractor effort towards achieving
11 contract objectives. It identifies accomplishments to date and
12 difficulties encountered and compares the status achieved to
13 planned goals and the resources expended. It is used by the
14 Government to monitor and evaluate contractor performance.

15 **THE COURT:** And is this a classified or
16 unclassified, from your perspective?

17 **MS. WEEKS:** Your Honor, I believe it's unclass--
18 you're talking to me?

19 **THE COURT:** Yes.

20 **MS. WEEKS:** I believe it's unclassified, but it
21 might have been kept on the high side and it might also have
22 classified aspects of it to the extent it's getting into the
23 technical contract requirements.

24 **THE COURT:** So is your client saying that she
25 actually prepared reports like this?

1 **MS. WEEKS:** Yes, Your Honor.

2 **THE COURT:** But she doesn't have them?

3 **MS. WEEKS:** Correct.

4 **MR. GRAY:** I'm sorry, are we sure she's actually
5 saying that?

6 **MS. WEEKS:** Yes, Your Honor.

7 **MR. GRAY:** She's actually saying she prepared these
8 reports on what, a weekly basis or a monthly basis?

9 **MS. RICHMAN:** Excuse me, Your Honor, we have good
10 reason to believe and proffer to the Court that our client
11 created these reports. We're not putting her on the stand to
12 testify right now or putting statements by her into the
13 record.

14 **THE COURT:** No, I was trying to understand, though,
15 I wasn't -- because I don't think it's fair to ask the
16 Government to go on a wild goose chase, so I was trying to
17 find out if this is theoretical or we know she's claiming she
18 really did make these submissions.

19 **MS. RICHMAN:** I'm a little bit of a problem solver,
20 Your Honor, and one thing that occurs to me is that if it is,
21 in fact, relatively easy to run this term over the documents
22 that have been collected so far, it might be possible to know
23 whether there's actually any hits pretty quickly.

24 **THE COURT:** Well, I understand that, but I'm not
25 interested in broadening it to people who weren't already

1 searched.

2 **MS. RICHMAN:** And I don't think we're asking that.

3 **THE COURT:** Okay, well I only got the names that
4 just were read.

5 **MS. RICHMAN:** You mean you don't want to broaden it
6 for people who were searched for "status report" or
7 searched --

8 **THE COURT:** I don't want to broaden the search for
9 people for whom a search for some reason wasn't conducted in
10 the time period you're talking about.

11 **MS. RICHMAN:** Okay, that's fine. I think the only
12 person's name that was added by Ms. Weeks was Jennifer Blake.
13 So I think everybody else on our list, we used that list
14 because our understanding was they had been collected and
15 searched already.

16 **THE COURT:** So -- okay.

17 **MS. RICHMAN:** So then I wonder whether Ms. Weeks can
18 continue to establish the relevance of this document. I know
19 it seems like there's two sides of the Government's concern in
20 terms of burden. One is the search itself, the second is the
21 redaction and production process. We don't know whether there
22 will be a burdensome redaction and production process if this
23 turns up zero hits. And I wonder whether we could just get
24 some -- I was kind of hoping we'd come here today and get some
25 baseline information about how large this universe for the

1 seven terms that the defense added to people already searched
2 so that we can make these decisions in a nonspeculative
3 manner.

4 I'll let Ms. Weeks continue, but I did want to put forth
5 that suggestion. If we could even quickly get like how many
6 hits are there for the terms that Your Honor believes are
7 relevant to the issues of loss, and then we can make informed
8 decisions about how burdensome redaction and production of
9 these documents would be.

10 **MR. GRAY:** Your Honor, I just have a quick question.
11 I want to make sure this is clear on the record. Is the
12 defendant saying these release status reports were produced on
13 a weekly basis or monthly basis? And over what period of time
14 is she saying she produced the reports?

15 **MS. WEEKS:** And I would just refer the Court back to
16 the contract requirements which state that this was a weekly
17 requirement and that it was to be delivered no later than
18 Thursday weekly. That's what the contract states.

19 **MR. GRAY:** And the one thing I would ask -- that I
20 would say, Your Honor, further on this point is having looked
21 at that text as to what these reports are supposed to say, it
22 explains where Jonathan Smith was coming from when he
23 testified at trial "Why would I have cared about reports like
24 this when we're all in the small room" -- except for Ms.
25 McComber, of course -- "day in and day out working directly

1 with each other. Why would I have needed anything like that?"

2 **THE COURT:** Okay, he did essentially say -- those
3 may not have been his exact words, the gist of it. That said,
4 it doesn't mean that there weren't reports. Maybe there were,
5 maybe there weren't. Obviously I have no idea. I highly doubt,
6 frankly, that there were weekly reports based on the way the
7 contract was managed at this stage late in the life of the
8 contract. It doesn't seem -- there wasn't any testimony, for
9 example, of the defendant when she testified that she was
10 producing these reports, if my memory is correct.

11 **MR. GRAY:** Also, Your Honor, let's bear in mind that
12 since we've had Mr. Stein invoked here, someone who I think it
13 became clear over the course of these proceedings was quite
14 frankly a crank, that he was asked on direct examination at
15 trial by me: "Have you ever seen any of Ms. McComber's work
16 product?" His answer was "No." I then asked him: "Have you
17 ever even requested to see any of Ms. McComber's work
18 product?" His answer, was again, "No."

19 **MS. WEEKS:** I believe he was accepted as an expert
20 on contract process and procedures, DOD. I don't think he was
21 a fact witness as to the work product that Ms. McComber was
22 producing.

23 **THE COURT:** So my question is to the people at
24 NSA -- and if I understood you correctly, Ms. Richman, you
25 were suggesting not all of the search terms you originally

1 sought are you pressing now.

2 **MS. RICHMAN:** We have added seven suggested
3 additional search terms. I think we've talked about "badge"
4 and we've talked about this particular form.

5 **THE COURT:** But why "badge"?

6 **MS. WEEKS:** But we also talked about, Your Honor,
7 the fact that we'd be happy to meet and confer with the
8 Government.

9 **THE COURT:** But that drags everything else, so I'd
10 rather -- the purpose of the "badge" was because it's somehow
11 relevant to onboarding. Is "onboarding" a word?

12 **MS. RICHMAN:** Yes, Your Honor. And I will note that
13 I think that was a word that was misspelled in the previous
14 search terms that were run of these custodians, at least in
15 Excel that was provided to us. I don't know that that's
16 reflective of what was typed into the search engine. So
17 there's these seven terms. And my suggestion would be to the
18 extent that the Court agrees with us that they're narrowly
19 tailored and I understand there's more discussion to be had
20 about at least one of these, that we just get a list of hits,
21 determine if this is a universe that is significant and then
22 can make informed decisions about whether this would be unduly
23 burdensome to NSA to produce.

24 **THE COURT:** Right. And so what I'm hearing -- and I
25 want to hear from NSA on this -- is that at least initially

1 the request is to conduct a search of people for whom a search
2 has already been conducted that just expands the use of a
3 handful of search terms, such as "onboarding" spelled
4 correctly or "on board" with the additional formulations of
5 that word; "DI_mgmt" et cetera.

6 **MR. PYNE:** Your Honor, I know Ms. Peacy can probably
7 respond to this better, but I know for you put it on Rob
8 Bryant, for instance, they only have one month of his emails.
9 And so that would have to go through the process of
10 recreating--

11 **THE COURT:** No, I was going to limit it to periods
12 where we already have done the search, not asking NSA to
13 expand the months that were searched. That I can't justify.

14 **MR. PYNE:** So it would be limited to individuals
15 where we have emails from 2016 and 2017?

16 **THE COURT:** No, it would be limited to anyone for
17 whom you have emails that were searched before for whatever
18 period you searched them. So if Jennifer Blake was only one
19 month, then you're only going to look for one month.

20 **MR. PYNE:** Very good.

21 **THE COURT:** The thing about Rob Bryant that remains
22 unclear is whether he wasn't part of this because he was
23 previously already searched. As Mr. Gray was suggesting,
24 given his importance at the trial, they, meaning the
25 Government, may have already conducted a search and turned

1 information over unrelated to my August 22 order. And that's
2 why he wasn't captured again.

3 **MR. PYNE:** And some individuals did a search
4 themselves, so those would not be in that universe.

5 **THE COURT:** Okay, and do we know who they are?

6 **MR. PYNE:** I'm sure we could determine that. Michael
7 Miller.

8 **MR. GRAY:** Michael Miller's were part of that final
9 production of 1,100 pages of documents on January the 12, 2023
10 that's shown on Government production letter 12.

11 **THE COURT:** But running the search term, Mr. Pyne,
12 is that -- let's say you had somebody for the whole 19 months
13 whose records are part of this. Is running the search term for
14 the 19-month period difficult, additional search terms?

15 **MR. PYNE:** It's going to involve running it against
16 19 different data sets.

17 **THE COURT:** Because each one is a separate -- each
18 month is a separate data?

19 **MR. PYNE:** Exactly.

20 **THE COURT:** Is that long though? Is that time
21 consuming? Is that laborious? Not talking about the
22 redaction now, we're just talking about if there's even a hit.

23 **MR. GRAY:** I think that's a Ms. Peacy question.

24 **MS. PEACY:** A couple days per person.

25 **THE COURT:** I didn't hear the answer.

1 **MR. PYNE:** Her answer was it would take a couple
2 days per person.

3 **THE COURT:** So let's focus on the people who really
4 matter. I mean, you know who they are. I don't know who they
5 are, Ms. Richman. From your client's perspective, she knows
6 who she wants searched. We can't do everybody. I don't think
7 it's justified anyway, but let's just say I'm willing to allow
8 this search. Obviously just my guesses would be Jason Clark,
9 Jacky McComber, Kristin Mair, Donn Pugh, Regina Shirley,
10 Jonathan Smith and for the month that there's Rob Bryant that
11 we know of.

12 **MS. RICHMAN:** Give me a moment to confer?

13 **THE COURT:** I'm sorry?

14 **MS. RICHMAN:** If I could have a moment to confer,
15 Your Honor?

16 **(Discussion held off the record.)**

17 **MS. WEEKS:** Your Honor, so the custodians to search
18 for this particular status report would be Jacky McComber,
19 Jason Clark, Jon Smith, Donald Pugh, Tiffany Starr-Smith.

20 **MR. GRAY:** I'm sorry, could you go a little slower?
21 Who else?

22 **MS. WEEKS:** Jon Smith, Donn Pugh, Tiffany
23 Starr-Smith, Erica Heinze, Regina Shirley. And then for
24 whatever documents of these custodians that have been
25 collected, Rob Bryant and Jennifer Blake.

1 **MR. GRAY:** So I'm sorry, how many names is that all
2 told?

3 **MS. WEEKS:** Nine with the caveat on the two that
4 it's for the documents that were already collected.

5 **MR. GRAY:** So potentially two days each, we're
6 talking roughly three weeks of work.

7 **THE COURT:** Can you go through the names one more
8 time? Jason Clark.

9 **MS. WEEKS:** Jacky McComber.

10 **THE COURT:** Jacky McComber.

11 **MS. WEEKS:** Jon Smith, Donn Pugh, Tiffany
12 Starr-Smith, Erica Heinze, Regina Shirley, Rob Bryant,
13 Jennifer Blake.

14 **THE COURT:** Not Kristin Mair?

15 **MS. WEEKS:** No, Your Honor.

16 **THE COURT:** Now with respect to your request for
17 hiring and staffing material and communications related to the
18 PMR in July 2017, is it the same process or are you asking for
19 some other effort on the part of NSA?

20 **MS. WEEKS:** Your Honor, we had suggested four search
21 terms related to hiring.

22 **THE COURT:** Is that part of your overall numbers
23 that you were giving me before or is this something else?

24 **MS. WEEKS:** Yes, that's part of that number.

25 **THE COURT:** So this is all one search is what I'm

1 trying to get at.

2 **MS. WEEKS:** Yes, if it takes one -- if it takes two
3 days per person, they could run this three or four additional
4 search terms for that person and then move onto the next
5 person is my understanding. I don't want to put words in their
6 mouth.

7 **THE COURT:** So tell me what search terms you have in
8 mind.

9 **MS. WEEKS:** Well Your Honor, again, we had proposed
10 "interview, hire, brief" which is designed to get at the --

11 **THE COURT:** What's the word?

12 **MS. WEEKS:** "Brief," but it was for like when new
13 hires are brought on, they are like debriefed or onboarded,
14 they get security briefs to get their security clearance. So
15 that's what that word is designed to capture. Again, we are
16 happy to limit this to "interview" and "Ironbridge" or
17 "Jacky," or ways to narrow these down to specific -- to narrow
18 it for relevance. But again, we haven't had that discussion
19 with the Government yet. We were just trying to capture all
20 the terms. "Onboarding" was misspelled. So it's "interview,"
21 "hire," "brief" and then maybe "badge" and "sponsor."

22 **THE COURT:** What's the last one?

23 **MS. WEEKS:** "Badge," "sponsor."

24 **THE COURT:** Sponsor?

25 **MS. WEEKS:** Yes. And then the other hiring term,

1 Your Honor, that we've added as an acronym it's "ECPRL" and
2 that is a database in which new contract hires have to be
3 enrolled. And Ms. McComber had a large role in facilitating
4 that process with people like Donn Pugh. But we would expect
5 that acronym to return documents related to the new hires on
6 the Ironbridge contract.

7 **THE COURT:** So let me turn back to either Mr. Pyne
8 or Ms. Peacy. When the search terms are entered, it's all done
9 by computer, right? So whether you have five terms or ten
10 terms, is that significant?

11 **MS. PEACY:** We have to search one term at a time. We
12 can search "hire and InfoTeK," but we have to search each term
13 separate. But outside of that, no.

14 **THE COURT:** That's important to know. But it is a
15 separate search by word. It's not like let's put in all the
16 words and it's going to search everything at the same time.
17 And you're shaking your head yes.

18 **MS. PEACY:** That's correct. You're correct in what
19 you're saying.

20 **THE COURT:** So fewer words saves time.

21 **MS. PEACY:** Yes, ma'am.

22 **THE COURT:** So -- well, what I've heard, what I
23 think is that to the extent there have already been identified
24 these searches that were previously conducted for certain
25 people, then it seems reasonable to me to expand the search

1 for those terms if we can sort of focus a little bit more
2 selectively on terms so it doesn't take as long. I'm not going
3 to introduce new people. I think that's beyond the pale and
4 you've already mentioned people for whom these searches were
5 already done as far as I'm aware, for whatever period it was
6 done.

7 I'm not asking NSA to go find new records beyond the
8 periods that they already searched for. I'm unclear on Rob
9 Bryant. I know there was at least one month or one email
10 rather. The suspicion is that he was already reviewed and I
11 would say NSA should verify that or the Government should find
12 out one way or the other because if he was, then he should be
13 included. But this is not going to be quick.

14 **MR. GRAY:** Your Honor, if I may add one other thing
15 on that. For -- well, to a decreasing extent over time I have
16 been trying to copy Mr. Cooch on emails about significant
17 things going on in this case just because I thought he might
18 have some interest. I can't remember the last time I got an
19 email response from him on any of those. And finally a couple
20 of nights ago he actually called me at home at about 9 in the
21 evening to apologize for not having gotten back to me. And
22 explained that he had been spending most of his time on a
23 series of matters down in Columbia, and that is in Columbia as
24 in Bogota, not Columbia as in Howard County. And that he
25 expected that he would be spending substantial time in

1 Columbia over the course of the weeks to come too.

2 **THE COURT:** So I know the defense copies him on
3 everything, but he's just not part of this case anymore, I'll
4 say unfortunately because he had a big role in terms of his
5 involvement in the case. And certainly I understood him to be
6 the lead person without a doubt once the discovery issues
7 really expanded. And after my order of August of 2022 he took
8 the lead on that, not Mr. Gray as far as I was aware. And
9 certainly the record would reflect that Mr. Gray complained
10 bitterly about the distraction of the whole discovery process
11 right down to the last minute when all of this was happening
12 and the decision was made to go to trial while the Government
13 was still trying to accommodate all of these requests.

14 I've always been unclear on what took place before that
15 order of October of 2022, but I certainly don't think it was
16 ground zero in October of 2022. It had already been, I
17 understood, voluminous production.

18 So that's the one thing that I think is a little murky to
19 me. This didn't start with my order. There had been an ongoing
20 extensive production by the Government, some of which may well
21 have encapsulated a lot of what is now happening, what is
22 being asked for.

23 **MR. GRAY:** Your Honor, if I understand what I think
24 you're talking about, obviously we've had extensive hearings
25 about the so-called *Brady* motion back in July -- actually,

1 those may have been the 28th and 29th of August or 29th and
2 30th of August 2022 that we had those discussions. And at the
3 end of the second day in late August, you sort of let us know
4 what you wanted us to do and then tasked us with putting
5 together a draft order. We tendered that to Mr. Ahlers
6 sometime in September.

7 If I remember rightly, your final order formally adopting
8 that wasn't until November the 16th of 2022. But all of the
9 effort to produce the stuff that was called for had been
10 underway for months.

11 **THE COURT:** Thank you. But my point, the larger
12 point was discovery didn't begin with that order. Discovery
13 had been made by the Government as to what the Government
14 thought it was obligated to produce well before my order.

15 **MR. GRAY:** Right, Your Honor. It was -- that had
16 been done by us before Mr. Ahlers filed his first -- his
17 so-called motion to compel which I think was like July the 6th
18 of 2022.

19 **THE COURT:** Right. And all I was trying to
20 establish is discovery didn't begin with my order. The hearing
21 was August and maybe I'm misstating the date. But the bottom
22 line is I made an oral determination in August of 2022. And by
23 then it had always been my understanding that the Government
24 had certainly made an ample production. The question was Mr.
25 Ahlers' theme had been, for example, "the Government approved

1 the invoices. It wouldn't approve invoices unless it thought
2 the work was done. The Government accepted the work and
3 therefore the work must have been done." And there was a lot
4 of time spent on federal acquisition regulations and matters
5 of that type. And some of what I basically approved from his
6 perspective in August of 2022, regardless of the actual date I
7 signed an order, was consistent with what he was trying to
8 present as his defense, that the Government wouldn't have paid
9 if the work hadn't have been done. So the work must have been
10 done because the Government paid. I mean, there was a big
11 theme if my memory is correct along those lines.

12 Is that your memory, Mr. Gray? Or different?

13 **MR. GRAY:** No, that was certainly one of his themes
14 and he argued that simply by paying the invoices that
15 constituted an acceptance and then this would tie into various
16 of Mr. Stein's opinions about the Government has to, like,
17 verify everything, presumably verify the exact hours for all
18 15 or 16 people who worked on the "small contract" as the
19 Government people called it every month before it pays, even
20 though there's prompt payment rule that applies to the
21 Government because if they don't pay promptly, then the
22 contractor can't pay its subcontractors and it has cascading
23 effects.

24 **THE COURT:** Well, and also we reviewed at some point
25 provisions that discuss that if your -- and the argument that

1 if you're defrauded, you wouldn't know that it wasn't done and
2 so once you find out if that's what the claim is, then you're
3 not bound by having paid when you didn't have all the
4 information.

5 **MR. GRAY:** Exactly.

6 **THE COURT:** My question now is this: I'd like to
7 find out from the defense, we have a sentencing date of March
8 7th. What I've heard from NSA today is that the more months
9 involved, the longer it takes. The more search terms there
10 are, the longer it takes. I don't know if it's accurate, but
11 roughly two days a person, we have nine people, that's 18
12 days. And that's not necessarily starting this minute.

13 So what do you want to do about the sentencing? And that
14 doesn't begin to cover the redactions, if there are any.

15 **MS. WEEKS:** Would it be possible for us to take a
16 five-minute break? We've be going for three hours.

17 **THE COURT:** Yes. And I'll just say this, Mr. Gray,
18 I'm positive that every lawyer here has been involved in cases
19 where for whatever reason, the sentencing doesn't follow from
20 the conviction as quickly as we would like for a variety of
21 reasons. Just this week I had one that for which due to health
22 reasons, there was an incredibly long delay regarding the
23 sentencing of the defendant. It's not ideal, I will agree with
24 you on that, but I can't -- I want this to come to an end and
25 I've said that, but I cannot make my decision on the basis of

1 that. If I think that there's a reasonable period that we can
2 accomplish this and I can make sure every i has been dotted
3 and every t has been crossed, then I'd like to do that.

4 **MR. GRAY:** I understand that, Your Honor. I mean, no
5 one could fail to be impressed by your commitment to fairness
6 and your -- I didn't like it when you said the other day that
7 you thought you were a plodder. The word I would use --

8 **THE COURT:** I thought I was what?

9 **MR. GRAY:** A plodder, p-l-o-d-d-e-r. I think you're
10 very deliberative and deliberate and those are fine things.

11 There are certainly other cases in which there are
12 lengthy delays for whatever reason between trial and
13 sentencing, but in none of those cases does the case that's
14 been tried continue to chew up the sheer amount of Government
15 personnel time that this case has continued to chew up in a
16 way that prevents us from moving on to work on other matters.

17 **THE COURT:** And I thought about that a lot in my
18 spare time like from 2 a.m. to 4 a.m. and I thought about your
19 comments. I think about everybody's comments. And all I could
20 say to myself was everybody has worked really, really hard and
21 that's our job. That's what we have to do. So I, for
22 example, said goodbye to everyone my office while I stayed
23 last night to prepare for today. So that's just what we have
24 to do. So sometimes it goes quickly and sometimes it doesn't.
25 Sometimes it goes smoothly, many times it doesn't.

1 We'll take that five-minute recess.

2 (Recess was taken from 12:58 to 1:08 p.m.)

3 **THE COURT:** A question for NSA. Let's say that one
4 of the searches that we were just contemplating shows a
5 reference to one of the search terms and let's say it's this
6 DI_mgmt, et cetera. Then what? These are -- we're searching
7 people, but how do you get the document?

8 **MR. PYNE:** Any document would be the attachment.

9 **THE CLERK:** Sir, you have to come up to a mic,
10 please.

11 **THE COURT:** Okay.

12 **MR. PYNE:** I was just saying that the only way
13 documents would be involved would be an attachment. But in
14 terms of if you're asking -- the email itself would be made
15 into a PDF, if that's what you're asking.

16 **THE COURT:** No, I was asking if there's a reference
17 to a document, how do you get the document because we're
18 searching people.

19 **MR. PYNE:** It would be an attachment and then that
20 would have to go through redaction as well.

21 **THE COURT:** I want to ask you this, Mr. Gray, and
22 then maybe come back to Mr. Pyne who was just speaking. But
23 let me ask you this, Mr. Gray: My memory is one of Mr.
24 Ahlers' big themes was about the adequacy of the contract file
25 and he talked a lot about -- there were all these discussions

1 about the file and then some of it is the shared drive and
2 some of it seemed like it would be a hardcopy. And he pointed
3 to regulations if my memory is correct that the Government was
4 supposed to maintain the file. So didn't -- didn't the
5 Government produce to the defense what it considered to be the
6 contract file? In other words, I'm trying to understand
7 whether this effort for something like these status reports,
8 wasn't this already -- I'm coming back to something I alluded
9 to. I'm not overruling myself, but I am trying to make sure
10 I've got it right. Didn't the Government produce what it
11 considered to be the contract file?

12 **MR. GRAY:** Absolutely, Your Honor. Just to be clear
13 on this for the purposes of the appellate record, originally I
14 think I naively believed that given that InfoTeK had its own
15 contract file which by the way, remains in existence and was
16 actually used as a trial exhibit and which was meticulously
17 maintained by Craig Plunkett who was a very meticulous,
18 deliberate -- kind of like Your Honor -- individual. And Mr.
19 -- my thought had been that he could come over and review the
20 contract file and ask for anything that he thought InfoTeK
21 didn't have. He never took me up on that offer.

22 Eventually when he began, like, just as a result of the
23 servicing of the Guinther letter, the Bosshardt email, the
24 arrival of Mr. Stein on the scene who convinced him based on
25 his reading of the FAR that all sorts of things are absolutely

1 mandated, required to be done, that are not necessarily done
2 on a day-in day-out basis, you know, at the NSA. That there
3 was all this other stuff and thus he insisted that he get the
4 entire Government contract file produced which we did in the
5 spring of 2022.

6 The kind of concepts that you're talking about that
7 absolutely everything has to be in the contract file -- and I
8 think Mr. Ahlers believed this for a while, he believed that
9 like all of the defendant's work product should be in the
10 Government's contract file, although apparently none of it was
11 supposed to be in the meticulously maintained InfoTeK version
12 of the contract file that Mr. Plunkett took care of. So the
13 idea that the contract file for a classified contract would
14 be, quite frankly, cluttered up by including not just stuff
15 that was relevant to the rights and responsibilities of the
16 parties under the contract, but all of the work that was
17 required under the contract was quite frankly nonsensical.
18 That was the kind of position that Mr. Stein was capable of
19 advocating, but that's not how -- it doesn't make sense, it's
20 not how it worked, and it's not anything that's required.

21 I think Mr. Stein also had some idea, it gets a little
22 hazy in retrospect. I think he -- yes, I believe he was of
23 the view that every separate contracting officer should be
24 maintaining their own contract file that they put stuff in.

25 **THE COURT:** He did make that argument or contention.

1 **MR. GRAY:** Right. Whereas --

2 **THE COURT:** And that's how I came to learn about the
3 shared drive, because that's where they made their entries.

4 **MR. GRAY:** And the response which makes sense was
5 that there was a single shared drive that was used for these
6 purposes because, I mean, there are on any contract like the
7 Ironbridge contract, you had the contracting officer
8 administrative, Mr. Pugh. You had the contracting officer
9 technical for much of the time, Mr. Smith. Later I think Mr.
10 Clark. You had the contracting -- you had various contracting
11 specialists. And so you would have -- the idea that each of
12 these people should have been maintaining a separate file
13 which then would have to go off to storage Lord knows where
14 where they turned over which they frequently did over the
15 course of a six or seven-year contract just did not make
16 sense.

17 But yes, the actual physical copy of the contract file
18 which existed in the contract office, that was produced to the
19 defense. And anything that was turned up by any of the search
20 terms and any files maintained by any of the listed custodians
21 up until the point where the defense pulled the plug, those
22 would have been produced as well.

23 Also, Ms. Peacy came up to me during the break and made
24 what I think was an important point which is that you'll see
25 here --

1 **THE COURT:** And let's say what the record is that
2 you're showing me.

3 **MR. GRAY:** Yeah, this is this list that I received
4 from the defense in which I believe is attached to ECF 410 or
5 411 of --

6 **THE COURT:** So it was 411?

7 **MR. GRAY:** 410 or 411, I'm really not sure which, of
8 the new terms that they wanted for each of these custodians.
9 And you'll see -- yeah, there it is. The DI_mgmt, various
10 numbers, 80368A, that is the CPEA. So they already searched
11 using not just the document number, but the abbreviation for
12 the name of the document. It's like contractor performance
13 evaluation something. So just the Court should just be aware
14 and it should be clear on the record that --

15 **MS. WEEKS:** What does CPEA stand for? I'm not sure
16 what that is or how it is the same thing. It's not referenced
17 on this sheet. I find this --

18 **MR. GRAY:** Do you want to come up here and address
19 this, Ms. Peacy?

20 **MS. RICHMAN:** And Your Honor, after Ms. Peacy comes
21 up I did want to correct the record on some of the discussion
22 just then about the production and collection of documents, I
23 didn't get a chance to -- before we move onto the next topic.

24 **THE COURT:** Sure. CPEA stands for what, Ms. Peacy?

25 **MS. PEACY:** Contractor Performance Evaluation

1 Assessment. I think that's what you described when you put up
2 the memo that described that document.

3 **MS. WEEKS:** No, I don't think so. I mean, this is a
4 weekly status report talking about -- I mean, this document is
5 longer than I showed on the screen earlier, but it has all the
6 milestones and tasks associated with the contract and it's the
7 contractor performing explaining the status of that. And it's
8 not an evaluation.

9 **MR. GRAY:** Actually, that CPEA sounds like it may be
10 something that goes more towards the evaluation.

11 **MS. RICHMAN:** The annual performance evaluation,
12 that's correct.

13 **MR. GRAY:** So we clarified that.

14 **THE COURT:** Okay, thank you.

15 **MS. RICHMAN:** Just briefly, Your Honor, I'm still
16 recreating this record from what I read, but my understanding
17 was that the reason for the Court's ruling was triggered in
18 part by --

19 **THE COURT:** Which ruling? There's been many.

20 **MS. RICHMAN:** The ruling I think it was the November
21 16, 2022 which reduced to writing the August 2022 direction
22 that the Court gave was predicated in part on testimony from
23 Ms. Kelly Sulewski. And she testified at that hearing -- I do
24 not have the transcript in front of me -- that the shared
25 drive had not been searched for individuals who were involved

1 with the Ironbridge contract. She testified that when she
2 looked into the file that she had reviewed she saw
3 discrepancies that she could only explain by the fact that
4 people were not putting what they should have been putting in
5 there. And so because of that, there was rather surprising
6 testimony that the OIG had never asked her to look into the
7 shared drives of any of these people, there was a decision
8 made to continue to look for these documents or to make sure
9 that these areas had been searched outside of the contract
10 file.

11 To the extent -- I guess just getting to the point of
12 Your Honor's question, I think if there were these weekly
13 reports, wouldn't they have been part of the file that's
14 already been produced to the defense? I think that the fact
15 of her testimony along with things like when various
16 custodians, the records were looked into, that's when they
17 first finally began to find performance evaluations that had
18 been requested for a long time and I think those were drafts.
19 But that's how those were located. So that is the reason why
20 this set of documents remains a database to be searched.

21 **THE COURT:** Well, I could be wrong. I don't recall
22 it entirely that way, but that may have been a factor. Mr.
23 Ahlers from the beginning with his motion for Bill of
24 Particulars had been demanding all kinds of information that
25 he said he was entitled to and needed and didn't get, et

1 cetera. But I just wanted to verify for myself that there was
2 some hardcopy of a hard file and that it had been produced.
3 What was in it, I couldn't tell you. But I do recall and with
4 a handful of exceptions, most all of whatever was produced in
5 response to my order of both the oral one, the written one of
6 August and November of 2022 didn't produce anything that
7 really -- there was a defense case, so I'm just saying, I
8 didn't see much of anything that came in from that effort.

9 **MS. RICHMAN:** Yeah, no. We've taken a look and I do
10 think there were a handful of exhibits that were produced.

11 **THE COURT:** Handful is what I'm saying. It was like
12 a massive undertaking and a handful.

13 **MS. RICHMAN:** And Your Honor, were I to redo this
14 case and had been the defense attorney, that might have been
15 different and that's not what I'm trying to do here. I'm
16 trying to steward us to sentencing.

17 You asked me a question before we went to break about
18 what we'd like to do.

19 **THE COURT:** Yes.

20 **MS. RICHMAN:** I'm struggling with the question a bit
21 because I do not want to indefinitely delay sentencing. I also
22 want to -- I feel that we're a bit stuck in this discussion
23 and I want to move forward.

24 One suggestion, I mean, with regard to moving sentencing,
25 I just looked at the dates. Mr. Gray I don't think would be

1 ready to file his sentencing memo tomorrow. I think if we were
2 to keep the March 7th date that would be required in order for
3 us to have a two-week period after the filing and then for
4 there to be an additional two-week period for the response.
5 And I think even then that would come right on the 7th. So I
6 don't think that's within the realm of possibility unless Mr.
7 Gray wishes to just stand on his prior sentencing submissions.

8 I spoke to Ms. Weeks and my client. We think that the
9 list of people to be searched could be further reduced to four
10 people.

11 **THE COURT:** Okay, that's excellent. Who?

12 **MS. RICHMAN:** Donn Pugh --

13 **THE COURT:** Let me just make note. Donn Pugh.

14 **MS. RICHMAN:** Jon Smith, Jason Clark and Regina
15 Shirley.

16 **THE COURT:** That's very helpful.

17 **MS. RICHMAN:** Thank you, I hope so.

18 **THE COURT:** And how about terms, any narrowing
19 there?

20 **MS. RICHMAN:** We will work to restrict the terms on
21 "badge" and also propose to -- and we are happy to communicate
22 directly with Ms. Peacy to the extent it expedites because we
23 really are in solutions mode. We want to get on the phone and
24 figure this out. So if there are limitations we can put "and"
25 connectors with these searches to make sure they're targeted.

1 We are very, very happy to do so because what we hope to see
2 is a narrow universe of hits that are easy.

3 **THE COURT:** Right. So what we didn't contemplate
4 yet, I mean, it's out there, is what happens when -- if and
5 when there are hits? Because that process I need some
6 understanding. I know we covered this before of exactly how
7 long that takes. I guess it's hard to know when you don't know
8 what turns up.

9 **MS. RICHMAN:** I'm really struggling with it, Your
10 Honor. I'm struggling with a solution to propose because I'm
11 not in a position where I want to waive my client's -- any of
12 her discovery rights and I do not want anything that I'm
13 proposing to be construed as such a waiver. I don't think the
14 Court would construe it that way, so I'm trying to balance
15 those two things.

16 We also want to get to sentencing, Your Honor. I too have
17 a lot of other cases and also this has just been -- it's been
18 significant for Ms. McComber as well. I understand everybody
19 has had a hard time with this case, Your Honor. I'm not trying
20 to elevate one person's situation above the rest, but I agree
21 it's time to get this to closure and I want to do that.

22 One thing that we could do, so these are four people. We
23 were quoted two days per person. That's about eight days.
24 We're not going to work on weekends, right, so that's about
25 two work weeks where we would have an idea of the universe of

1 hits that we have. We could set a sentencing date today
2 predicated on the understanding that there will be some
3 universe of hits. One thing that we could do is if there are
4 hits I don't know whether it's going to be possible to get the
5 one time read-in again where we could just go out and look at
6 the documents and narrow it down.

7 **THE COURT:** Is that possible?

8 **MR. PYNE:** That's possible. I actually brought that
9 up myself, but we don't know the classification. We can get a
10 one-time read usually up to Secret without too heavy a lift.
11 But if these are Top Secret classified, I don't know that we
12 could get present counsel cleared. There is other cleared
13 counsel in their office that came out previously, I don't know
14 if that would be an option.

15 **MS. RICHMAN:** I think we found it was really
16 difficult, but I have to anticipate that the universe in that
17 higher level of classification given what we're seeking might
18 be pretty small. And so my hope would be we could all work
19 together. Once there's hits, we could segregate out the most
20 sensitive documents, keep them back. We can get out there,
21 Your Honor, at the drop of a dime and reduce and narrow if
22 there's a need there. This isn't answering the question of
23 what's the date.

24 **THE COURT:** No, but it's helpful. So I think that's
25 the most efficient way to go, Mr. Pyne, is once the searches

1 are completed, the defense counsel comes out at least if they
2 can to review whether there's anything they even want you to
3 bother redacting.

4 **MR. PYNE:** Well, would it make sense, Your Honor, to
5 once we get the results, to inform both parties of the number
6 and classification of the results and --

7 **THE COURT:** I mean, I've always said -- I think I
8 said, I thought I said, I certainly meant to say why can't we
9 all work together here and we have a common goal.

10 **MR. PYNE:** Sure.

11 **THE COURT:** So justice always being the number one
12 priority. So if you and Mr. Gray and the defense team can
13 communicate, that's the first step. And then just my comment
14 that is in that submission by the defense and which Ms. Peacy
15 and you were on the line when I said it, I know that you
16 understood that all I was trying to say was we have to make
17 this happen. I wasn't trying to ask NSA to become -- to put
18 this case ahead of pressing needs, but I needed people to
19 understand it had to be prioritized because we have to come to
20 a conclusion. And so I needed your help to make that happen.
21 I was trying to implore you all to understand that you have
22 your ways, we have our ways. The wheels they say sometimes
23 grind slowly, the wheels of justice, but now we've got to move
24 them along and I needed your help. So that was what I was
25 trying to convey.

1 So if you all could possibly communicate that would go a
2 long way and then get them out there. But I'm here, so all you
3 have to do is let me know there's a problem and I think I've
4 -- the only day I couldn't make myself available at the drop
5 of a dime was May 5th when the Government wanted an extension
6 of -- May 5th now of 2023 -- of the Rule 29 memo because you
7 were working on your opposition or Mr. Ahlers' objections to
8 the sentencing and it waited until Monday. You filed it at I
9 don't know, in the afternoon sometime on May 5th. It happened
10 to be my Portrait Ceremony, I was a little busy. So otherwise
11 I think the record reflects I dropped everything the minute
12 any of you have a complaint, a concern, or anything and I
13 haven't changed my ways. So I'm here. You can call me if
14 there's an issue. I'll do whatever I can to find a time to
15 talk to you.

16 **MS. RICHMAN:** We really appreciate that and it's
17 been very helpful. And I would suggest that we're all in a
18 room right now. I don't know if we need Your Honor for this,
19 but there's these seven terms, we can sit down right now.

20 **THE COURT:** I would really -- I know people may be
21 hungry or maybe this made you lose your appetite, I don't know
22 which, but whatever it is, if you could spend a little bit of
23 time going over the search terms it would save a lot of time
24 down the road. I'm happy to stay and be a participant, but I
25 don't think you need me and I'm not sure it's appropriate.

1 So we have the four people, that's huge. But tell me what
2 you want to do with sentencing.

3 **MS. RICHMAN:** I think there's two things we could
4 do. We could put -- so we have two weeks there, right? If
5 there's hits, that's the wildcard right? It's taken them --
6 how long ago did you go out to NSA?

7 **MS. WEEKS:** The 22nd.

8 **MS. RICHMAN:** So it took about two weeks to produce
9 that narrow set of documents, but they were changed. So if we
10 assumed three weeks and so that's five weeks total and found a
11 sentencing date that would allow us to incorporate any new
12 materials into our submission and work backward from there,
13 with the strong hope that we get there.

14 **THE COURT:** And your point is well taken. What's the
15 point of any of this if you all don't get a chance to address
16 whatever it is that's found?

17 **MS. RICHMAN:** Right.

18 **THE COURT:** If there's anything found, if it's at all
19 relevant, obviously you're going to want to address it, both
20 sides.

21 **MS. RICHMAN:** Right. So five weeks from now puts us
22 I think in the first week of April.

23 **MR. GRAY:** I'm sorry, five weeks from now?

24 **MS. RICHMAN:** The first week of April, if I'm doing
25 this right but my third grader is admittedly better at --

1 **MR. GRAY:** Five weeks from now would be March.

2 **MS. RICHMAN:** March 5th. Oh, I was going from
3 February. Mr. Gray is on vacation and so we need to factor
4 that in as well. Mr. Gray you leave on March --

5 **MR. GRAY:** I leave on February 16th and I'm back on
6 the 29th.

7 **THE COURT:** The point you were making is you're
8 going to incorporate it in your submissions so you need time
9 to do your submissions. I mean, you can start, nobody has to
10 wait until they get this, this would just be an insert
11 somewhere. But it's already basically the 1st of February.

12 **MS. RICHMAN:** Yes.

13 **THE COURT:** And so --

14 **MS. RICHMAN:** I would suggest to look towards the
15 last week of March or the first week of April.

16 **MR. GRAY:** I'm sorry, for what? For completion of
17 the further reviews or --

18 **THE COURT:** I'm in trial the week of April 8th, just
19 so everybody--

20 **MS. RICHMAN:** Maybe we should sit down for a minute
21 and try to handle --

22 **THE COURT:** And then I'm in trial the week of April
23 15th. Do you want to take a minute?

24 **(Discussion held off the record.)**

25 **THE COURT:** I don't want to interrupt, Ms. Richman,

1 but just realistically five weeks until you have everything,
2 but then you have to give me your memos.

3 **MS. RICHMAN:** Right. And Mr. Gray still also has to
4 submit his memo.

5 **THE COURT:** And then your memo and then I need a
6 little time to digest it, so I don't see how you do this
7 before May.

8 **MS. RICHMAN:** Your Honor, you've been doing
9 scheduling like this a lot longer than I have, so I will defer
10 to the Court. And I hope that we won't -- because we defined
11 sort of the parameters of what remains to be done, that this
12 will not be as burdensome to the parties as prior periods and
13 delays have been.

14 **THE COURT:** I'm sorry, were you still trying -- were
15 you waiting for me or am I waiting for you?

16 **MS. RICHMAN:** Oh, I thought I was waiting for you,
17 Your Honor, that we were looking at May.

18 **THE COURT:** I didn't understand what you said. What
19 do you want me to look for?

20 **MS. RICHMAN:** I'll defer to you. I think we have
21 from other counsel on this case a blackout day on May 1st and
22 May 30th and I have a commitment May 22nd to May 24th, but we
23 are otherwise available.

24 **THE COURT:** I'm in trial the week of May 6th also.

25 **MR. GRAY:** Your Honor, my family and I typically go

1 away for a week in May down to the Georgia coast. I don't know
2 if my wife has set that in stone yet, but that's typically
3 when we do it. But if we're just talking about briefing dates
4 we can work around that.

5 **THE COURT:** No, I thought we were talking about the
6 sentencing and then we were going to work backwards for the
7 briefing.

8 **MR. GRAY:** Well, I'll have to check with my wife
9 about what week that would be. It's always in May. It's only
10 a week.

11 **MS. RICHMAN:** It's a later week in May for your
12 vacation?

13 **THE COURT:** I was going to say May 17, does that
14 work?

15 **MS. RICHMAN:** That works for defense.

16 **MR. GRAY:** Let me double check with my wife and our
17 schedules, but May 17th tentatively sounds okay.

18 **THE COURT:** I'm counting the number of trial days in
19 my case. It's always risky because I'll be in trial. I want
20 to make sure I read everything, of course. But how about if we
21 say May 17 at 10 a.m. And so that means I would need -- now
22 just to be clear, getting the Government's sentencing memo,
23 the defense sentencing memo, am I getting a reply; is that
24 contemplated?

25 **MR. GRAY:** Yes.

1 **THE COURT:** So I'm just saying, don't hold me to
2 these, I'm going to play with them. But if I have a sentencing
3 on May 17, I would want the reply on May 3rd. And that means
4 the response or opposition would be April 19, I think. I
5 think that's right. And then that means the memo April 5th.

6 **MR. GRAY:** Okay. I'm sorry, Your Honor.

7 **THE COURT:** Does that sound right to everybody?

8 **MR. GRAY:** Yes. Could I get the blackout dates for
9 first Your Honor's trial and on the defense side for the month
10 of May? Because I am going to have to check with my wife.

11 **THE COURT:** Yes. And I just want to point out that
12 that's not that long. I mean, that just -- I don't want to be
13 -- I don't want to have to revisit it. Is it too ambitious?
14 The first memo is due April 5th and realistically -- we don't
15 know what we're going to find, but I think we're looking at
16 roughly a five-week process.

17 **MR. GRAY:** Your Honor, I think this is doable. I
18 had begun thinking as we got into the first couple of weeks of
19 this year like it was looking to me that this was ultimately
20 going to have to be done in May. And I think Your Honor has
21 already addressed this, but I just do have a strong concern
22 that we have enough time in the schedule so that things aren't
23 having to be done on a crash basis that excludes my ability to
24 take time off when I need to or to work on other matters.

25 **THE COURT:** Okay, well you asked for my trial

1 schedule. I'm only going to bother with April and May.

2 **MR. GRAY:** Yeah, May is really the month I'm
3 concerned about because of our standard family vacation plans.

4 **THE COURT:** I thought you wanted my schedule.

5 **MR. GRAY:** I do. I want to know what weeks you're
6 out of pocket in May in case my wife tells me she wants to be
7 away the week of the 17th.

8 **THE COURT:** Well, I have trials throughout April and
9 then again on May 6th.

10 **MR. GRAY:** For how long?

11 **THE COURT:** So -- okay.

12 **MS. RICHMAN:** Mr. Gray was--

13 **THE COURT:** Now the one final request would be if
14 you want to prepare something to memorialize what transpired
15 today.

16 **MS. RICHMAN:** I can try, Your Honor.

17 **THE COURT:** Okay.

18 **MS. RICHMAN:** The other issue I want to circle back
19 on, Your Honor, and I want people to get to lunch is that we
20 would like to have more information about the Government has
21 now made several allusion to potentially having received a
22 group of materials for production that did not make it out for
23 production for whatever reason, the paralegal was busy or the
24 trial. We'd like a firm answer on that as soon as possible,
25 Your Honor. And if those materials were not produced we would

1 like them produced to us. We are just learning of this. This
2 is new information. We are learning. We were not aware of it
3 in our representation of Ms. McComber to date and now we want
4 to investigate it and make sure we understand exactly what
5 happened with that production and what it contained, if it was
6 held back.

7 **MR. GRAY:** My suspicion is that most of it is the
8 production that went out on January the 12th. That's the
9 1,100 pages, but I'll check that with Ms. Peacy. One of the
10 problems is that the file sharing system that the Government
11 now uses for production of discovery, USAfx, material only
12 stays in there for 60 days and then it, like, evaporates. So
13 determining exactly what hit our USAfx system in early January
14 of 2023 may not even be possible.

15 **THE COURT:** But NSA has a record. What I don't know
16 though from that is that doesn't necessarily mean the
17 Government didn't produce it.

18 **MS. RICHMAN:** Right. We have the complete volume of
19 production cover letters. And so if NSA wanted to produce
20 that log to us we could compare it against the materials that
21 have been produced to find a quick answer to this question.

22 **THE COURT:** Any problem with that, Mr. Gray?

23 **MR. GRAY:** Not that I'm aware of, Your Honor.

24 **THE COURT:** Okay. So you can include that in your
25 proposed order.

1 **MS. RICHMAN:** Great. And I might suggest a date.

2 **THE COURT:** I think just -- these are just proposed
3 orders, I realize that, but I don't know that it needs
4 editorializing.

5 **MS. RICHMAN:** Keep it simple?

6 **THE COURT:** What I said in a hearing, live
7 commentary like I need NSA to do this, that, or the other.

8 **MS. RICHMAN:** Understood, Your Honor.

9 **THE COURT:** Let's just keep it neat and simple.

10 **MS. RICHMAN:** Yes, Your Honor. Would you like me to
11 submit a proposed scheduling order as well or do we want to
12 wait until Mr. Gray has confirmed his schedule?

13 **THE COURT:** I suppose we may as well wait.

14 **MR. GRAY:** I'll try and do that today, Your Honor.

15 **THE COURT:** Okay. So I'm going to enter though just
16 because I don't want to forget, the sentencing on my calendar,
17 the court calendar for May 17th and if I have to change it,
18 that's fine.

19 **MR. GRAY:** Right, that's fine.

20 **THE COURT:** But we'll get it up there.

21 So what didn't I address that we need to address other
22 than a deadline for a proposed order?

23 **MR. GRAY:** I think that covers it, Your Honor.

24 **THE COURT:** Obviously it has to go to you first, Mr.
25 Gray, and if you object to any of it then you get to submit

1 whatever version you think I should sign. But again, the same
2 commentary, I don't need editorializing, I just need the
3 facts.

4 So can you do that relatively quickly, by certainly the
5 end of the week?

6 **MS. RICHMAN:** Absolutely, Your Honor. And my hope
7 is we'll be able to confer with NSA now on search terms which
8 we'll include in the order.

9 **THE COURT:** Well, let me publicly acknowledge and
10 express my gratitude to the people from NSA who did take time
11 from their very demanding work schedules, I'm sure, important
12 work to come here. It was actually extremely helpful and I
13 don't know what questions, I couldn't tell you were going to
14 arise, but the fact that some of you were able to answer
15 substantively what either has taken place or what the process
16 would be going forward was enormously beneficial and helped us
17 resolve the disputes for today. So I do want to thank you all
18 very, very much.

19 If there's nothing else, we'll stand in recess.

20 **MR. GRAY:** Very good.

21 **(Proceeding concluded at 1:42 p.m.)**
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